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Supreme Court, U.S.
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No.____

IN THE

Supreme Court of the United States

HOUSEHOLD INTERNATIONAL TAX REDUCTION INVESTMENT PLAN,
Petitioner,

v.

ROBERT J. MATZ,
INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should a court consider fully vested participants when determining if an employee pension plan has been "partially terminated"?

2. Is an amicus brief submitted on behalf of the IRS entitled to the mandatory deference described in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or is it entitled to judicial deference only if it warrants deference under the standards announced in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)? [1]

3. When determining if an employee pension plan has been "partially terminated," should a court consider all participants whose employment was terminated due to "related" corporate transactions (spanning multiple "plan" and calendar years)?

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[1] A similar question is before the Court in *United States v. Mead Corp.*, No. 99-1434. If the Court is not inclined to grant this Petition, Petitioner respectfully asks the Court to hold it pending the decision in *Mead Corp.*, and then dispose of it as appropriate in light of the resolution of that case.

PARTIES

Petitioner, Household International Tax Reduction Investment Plan (the "Household Plan" or the "Plan"), and Respondent, Robert J. Matz ("Matz"), were the only parties to the proceedings before the Seventh Circuit.

The Household Plan is an employee pension benefit plan sponsored by Household International, Inc. ("Household"). Household has no parent company and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

The Household Plan petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court below, which is reported at 227 F.3d 971, is reproduced at Appendix ("App.") 1a –11a. The November 30, 1998, opinion and order of the district court appears at 1998 WL 851491 and is reproduced at App. 12a-21a. The September 8, 1999, opinion and order of the district court appears at 1998 WL 754659 and is reproduced at App. 22a-37a. The order denying the Household Plan's petition for rehearing and petition for rehearing *en banc* is reproduced at App. 38a-39a.

JURISDICTION

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). The Seventh Circuit filed its order denying rehearing on November 6, 2000. This Petition was filed within ninety days of that date.

STATUTES AND REGULATIONS INVOLVED

Internal Revenue Code ("IRC") § 401a(7), 26 U.S.C. § 401(a)(7):

> A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part satisfies the requirements of section 411 (relating to minimum vesting standards).

IRC § 411(d)(3)(A), 26 U.S.C. § 411(d)(3)(A):

> **Termination or partial termination; discontinuance of contributions.** —Notwithstanding the provisions of subsection (a), a trust shall not constitute a qualified trust under section 401(a) unless the plan of which such trust is a part provides that—
>
> A. upon its termination or partial termination, . . .
>
> the rights of all affected employees to benefits accrued to the date of such termination, partial termination, or discontinuance, to the extent funded as of such date, or the amounts credited to the employee's accounts, are nonforfeitable. . . .

Employee Retirement Income Security Act ("ERISA") § 3(2)(A), 29 U.S.C. § 1002(2)(A):

> Except as provided in paragraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—
>
> (i) provides retirement income to employees, or
>
> (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,
>
> regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

ERISA § 3(34), 29 U.S.C. § 1002(34):

> The term "individual account plan" or "defined contribution plan" means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B):

> **(a) Persons empowered to bring a civil action**
>
> A civil action may be brought—
>
> (1) by a participant or beneficiary—

* * * *

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

ERISA § 203(a), 29 U.S.C. § 1053(a):

Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

(1) A plan satisfies the requirements of this paragraph if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.

(2) A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A) or (B).

(A) A plan satisfies the requirements of this subparagraph if an employee who has completed at least 5 years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit derived from employer contributions.

(B) A plan satisfies the requirements of this subparagraph if an employee has a nonforfeitable right to a percentage of the employee's accrued benefit derived from employer contributions determined under the following table:

Years of service	The nonforfeitable percentage is:
3	20
4	40
5	60
6	80
7 or more	100

Treasury Regulation 1.401-6(b), 26 C.F.R. § 1.401-6(b):

> *Termination defined.* (1) Whether a plan is terminated is generally a question to be determined with regard to all the facts and circumstances in a particular case. . . . .
>
> (2) For purposes of this section, the term *termination* includes both a partial termination and a complete termination of a plan. Whether or not a partial termination of a qualified plan occurs when a group of employees who have been covered by the plan are subsequently excluded from such coverage either by reason of an amendment to the plan, or by reason of being discharged by the employer, will be determined on the basis of all the facts and circumstances. . . . [I]f a partial termination occurs, the provisions of section 401(a)(7) and this section apply only to the part of the plan that is terminated.

Treasury Regulation 1.411(d)-2(b)(1), 26 C.F.R. § 1.411(d)—2(b)(1):

> Whether or not a partial termination of a qualified plan occurs (and the time of such event) shall be determined by the Commissioner with regard to all the facts and circumstances in a particular case. Such facts and circumstances include: the exclusion, by reason of a plan amendment or severance by the employer, of a group of employees who have previously been covered by the plan; and plan amendments which adversely affect the rights of employees to vest in benefits under the plan.

STATEMENT OF THE CASE

Petitioner asks the Court to resolve a split in the Circuit Courts concerning significant and recurring issues that arise when federal courts are asked to determine if a pension plan covered by the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* ("ERISA"), has been "partially terminated." The federal courts are struggling with these issues and need guidance from this Court.

The pension plan involved in this case is the Household Plan, which is a defined contribution employee pension plan within the meaning of Sections 3(2)(A) and 3(34) of ERISA, 29 U.S.C. §§ 1002(2)(A), 1002(34), and is intended to be a qualified profit sharing plan under Internal Revenue Code ("IRC") § 401(a).[2] Household sponsors the Plan for the exclusive benefit of its employees and employees of its subsidiaries. Household makes matching contributions to the Plan on behalf of employees who elect to participate by making their own contributions.

Under the Plan, participants are 100% vested in the amounts credited to their accounts that is attributable to their own contributions, regardless of length of service. However, until September 1995, the Household Plan contained a 5-year vesting schedule for employer matching contributions. Article 14.1 of the Plan provided that a participant obtained a vested interest in the amount credited to his/her account attributable to Household's matching contributions at the rate of 20% per year, becoming fully vested in such amount after five years of service.[3] Under normal circumstances, if a participant's employment was terminated for reasons other than death, disability, or retirement, any unvested account balance was forfeited and used to reduce Household's future matching contributions.[4]

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[2] Both the employer and the employees benefit if a plan qualifies under IRC § 401(a). Employers, within certain limits, are permitted to deduct contributions made to qualified plans for income tax purposes (whether or not the employees' interests are vested); earnings on the plans' assets are exempt from income tax; and employees defer income tax on employer contributions made on their behalf until they actually receive amounts attributable to such contributions, generally after retirement when their incomes and, hence, applicable tax rates tend to be lower. IRC §§ 402(a), 404(a), & 501, 26 U.S.C. §§ 402(a), 404(a), & 501.

In September 1995, Household amended Article 14.1 to eliminate the 5-year vesting schedule, thereby making all participant accounts 100% vested regardless of length of service. From that point forward, all participant accounts were fully vested.

As required by IRC § 411(d)(3), the Household Plan also provides for full vesting if the Plan is terminated or partially terminated. Article 19.2 of the Plan states that "[I]n the case of the termination of the Plan by Household International, Inc. . . . or a partial termination of the Plan with respect to a group of participants, the account balance of each affected participant will become 100% vested."

Matz was an employee of Hamilton Investments, Inc. ("Hamilton"), a wholly owned subsidiary of Household. He elected to make payroll contributions to the Household Plan and Household made matching contributions on his behalf. His employment at Hamilton was terminated on September 1, 1994, when Household sold substantially all of Hamilton's assets.

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[3] ERISA and the IRC expressly permit full vesting within seven years of service so employers may reward employees with longer service over those with less service. *See* 26 U.S.C. § 411(a)(2); 29 U.S.C. § 1053(a)(2).

[4] The forfeiture of non-vested benefits to reduce employer matching contributions is expressly authorized by the IRC (26 U.S.C. §§ 401(a)(8) & 411(a)(2)) and ERISA (29 U.S.C. § 1053(a)(2)), and has been recognized as fostering the important goal of pension plan sponsorship. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 517 (1981).

At the time of his termination, Matz was 60% vested in the amount credited to his Household Plan account attributable to Household's matching contributions. The remaining 40% (which was valued at $7,289.92) attributable to Household's matching contributions was forfeited. He received a distribution from the Household Plan in the amount of $27,914.10, the full amount of his vested account balances.

In March 1995, Matz sent a letter to the Administrative and Investment Committee of the Household Plan asking to be fully vested because:

> 1. For my part, I kept all goals and objectives as assigned to me at Hamilton Investments. I would have hoped to retire from Hamilton Investments or a division of Household International. In effect, the plan was terminated for myself and all other Hamilton employees.
>
> 2. I was almost vested and fell short by only a few months. I feel this should have been taken into consideration by Household or should be evaluated by the committee at the present time.

See Matz v. Household Int'l Tax Reduction Investment Plan, No. 96 C 1095 (N.D. Ill. March 31, 1997) (order denying motion for summary judgment) ("March 31, 1997 Order"). The Committee denied Matz' request. By letter dated April 5, 1995, the Committee advised him that it was required to apply the terms of the Plan equitably to all Plan participants and could not make exceptions to the Plan's vesting provisions for individual participants who had not completed the requisite five years of service. *See* March 31, 1997 Order. Matz did not appeal the Committee's decision and never filed any other claim with the Committee. Specifically, he never filed a claim that he was affected by a partial termination of the Household Plan that occurred by reason of "related" events that took place between September 1994 and May 1, 1996.

In February 1996, Matz filed a complaint in the United States District Court for the Northern District of Illinois (on his own behalf and on behalf of all others similarly situated) for benefits allegedly due him (and others) under the Household Plan. He alleged, among other things, that Household sold Hamilton "as part of an overall plan to refocus its business" and, subsequently (during the remainder of 1994 and in 1995) sold its residential mortgage business, its mortgage servicing business, parts of its banking business, and a life insurance subsidiary as a "continuation of its policy adopted in (or before) 1994 to refocus its business and reduce costs." Complaint, ¶¶ 12, 13. Matz later extended the alleged period of the partial termination to end in May 1, 1996.

On November 24, 1997, the Household Plan and Matz jointly asked the district court to permit them to brief two legal issues, "the resolution of which the parties believe have the potential of narrowing the issues to be tried, or the class to be certified, and may even dispose of the litigation altogether, or a substantial portion of it."

On December 22, 1997, the Household Plan moved for partial summary judgment on the first issue: whether participants whose employment was terminated after September 1995, when the Plan was revised to give full vesting, should be considered when determining if a partial termination occurred, and included in the plaintiff class. On November 30, 1998, the trial court granted the Household Plan's motion to exclude from the purported class those participants whose employment was terminated after September 1995. However, it denied the Plan's motion to exclude such participants from the analysis of whether a partial termination occurred.

On December 31, 1998, the Household Plan moved for partial summary judgment on the second issue: whether events occurring in multiple plan years can be considered when determining if a partial termination occurred. The trial court denied that motion on September 8, 1999.

On November 30, 1999, the court granted the Household Plan's motion to certify the orders of November 30, 1998, and September 8, 1999, for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Finding that an early resolution of the issues had the potential for disposing of this putative class action, the trial court certified two issues for interlocutory review:

(1) Whether, for purposes of determining if the Plan was "partially terminated," the court's analysis should include fully-vested employees terminated after the 1995 Plan amendment; and

(2) Whether the plaintiff's partial termination analysis may include terminations that take place over multiple (here, three) plan years.

App. 4a-5a.

On December 10, 1999, the Household Plan filed a petition for permission to appeal pursuant to 28 U.S.C. § 1292(b), which the Seventh Circuit granted on January 3, 2000.

The Seventh Circuit issued its opinion on September 21, 2000. App. 1a-11a. It affirmed the decisions of the trial court.

The court below reviewed the partial termination statute—IRC § 411(d)(3)—and its legislative history and concluded that neither provides a clear standard for determining if a partial termination has taken place. App. 5a-6a. Without citation or explanation, it then stated: "[p]artial termination is measured by using the ratio of terminated plan participants over the total plan participants." App. 7a.

Observing that courts have "generally understood" the purpose of IRC § 411(d)(3) to be: (1) to protect employees' legitimate expectation of pension benefits; and (2) to prevent employers from abusing pension plans to reap tax benefits, the court then said it agreed with the Household Plan that counting fully vested participants would further neither of these purposes:

> From a policy standpoint, the Plan makes a logical argument. Vested participants do not need further protection for their pension benefits and do not benefit from a finding of partial termination. Their benefits, by virtue of vesting, are non-forfeitable. The employer gains nothing either. No monies revert back to it because the benefits are vested and non-forfeitable. We agree with the Plan's arguments.

App. 7a (emphasis added). The court below noted that the court in *In re Gulf Pension Litigation*, 764 F. Supp. 1149 (S.D. Tex. 1991), *aff'd on other grounds sub nom. Borst v. Chevron*, 36 F.3d 1308 (5th Cir. 1994), *cert. denied*, 514 U.S. 1066 (1995), had excluded fully vested participants from the partial termination analysis. Observing that the opinion in *In re Gulf Pension Litigation* was both "thorough and thoughtful," the court below went on to state that the decision in that case "best furthers the purposes of the partial termination statute." App. 8a.

The court below nonetheless held that fully vested participants terminated after the 1995 Plan amendment should not be excluded from the partial termination analysis in this case because the court was "constrained" to give deference to the position taken by the Internal Revenue Service ("IRS") in an amicus brief submitted in another case—*Weil v. Retirement Plan Admin. Comm. of the Terson Co.*, 933 F.2d 106 (2d Cir. 1991) ("*Weil III*"). App. 8a. The court below never saw the amicus brief submitted in *Weil III*. Moreover, the *Weil* case did not involve a situation in which the plan had been amended to fully vest all participants midway through the period the plaintiff sought to include in the partial termination analysis. In deferring to the position taken by the

IRS in the amicus brief, the court below said it was required to defer to the IRS if its position was "reasonable."[5]

The court below addressed the 1995 Plan amendment in a footnote. It noted, "for the sake of clarity," that employees who were vested in 1995 by virtue of the Plan amendment are to be counted. App. 9a, n.3. Without explanation or analysis, it said: "The fact that they vested because of the Plan amendment and not because of years of service is of no consequence." *Id.*

The court below also held that corporate transactions occurring in multiple plan years may be aggregated when determining if a partial termination occurred. In this regard, it observed that neither the statute nor its legislative history specifies whether aggregation is permissible, and the only instruction comes from Treasury Regulation 1.411(d)-2(b)(1), which requires the Commissioner to consider "all of the facts and circumstances in the particular case." App. 10a-11a. It then said:

> We hold that because there is nothing in the language of the rule itself that requires a significant corporate event to occur within a plan year, Matz can combine terminations from 1994, 1995 and 1996, provided that he show the corporate events of those years were related.

App. 11a.

On October 5, 2000, the Household Plan filed a petition for rehearing with suggestion for rehearing *in banc* and asked the court below to take judicial notice of the amicus brief submitted on behalf of the IRS in *Weil III*. The court below denied the motion for judicial notice on October 20, 2000. It denied the petition for rehearing on November 6, 2000.

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[5] The trial court in this case also believed it was required to give deference to the amicus brief submitted for the IRS in *Weil III* and said it otherwise was "inclined" to rule that fully vested participants should not be considered. App. 20a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION OF THE COURT BELOW IS IN DIRECT CONFLICT WITH OTHER FEDERAL DECISIONS ADDRESSING THE FIRST QUESTION PRESENTED FOR REVIEW.

In deciding it is proper to consider fully vested participants when determining if the Household Plan has been partially terminated, the court below followed the decision of the Second Circuit in *Weil III*. The decision in *Weil III* was based entirely upon an amicus brief submitted to the Second Circuit by counsel for the IRS.

The decisions in *Weil III* and the court below conflict directly with the decision of the Fourth Circuit in *Babb v. Olney Paint Co.*, 764 F.2d 240 (4th Cir. 1985), where the court considered only participants who were not fully vested. They also conflict directly with the decision of the Southern District of Texas in *In re Gulf Pension Litigation*, 764 F. Supp. 1149.[6]

The court in *In re Gulf Pension Litigation* carefully considered the reason for the partial termination statute and held that fully vested participants should not be considered. 764 F. Supp. at 1165. That court held:

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[6] The only other reported cases in which courts reached the issue of whether fully vested participants should be considered in the partial termination analysis are *Halliburton Co. v. Commissioner*, 100 T.C. 216, 243-44 (1993), *aff'd without opinion*, 25 F.3d 1043 (5th Cir. 1994), *cert. denied sub nom. Nash v. Halliburton Co.*, 513 U.S. 989 (1994), and *Morales v. Pan Am. Life Ins. Co.*, 718 F. Supp. 1297, 1302 (E.D. La. 1989), *aff'd on other grounds*, 914 F.2d 83 (5th Cir. 1990). The Tax Court did not resolve the question in *Halliburton*. 100 T.C. at 244. The *Morales* court relied without analysis on the second district court opinion in *Weil v. Retirement Plan Admin. Comm. for the Terson Co.*, 1988 WL 64862 (S.D.N.Y. 1988), *rev'd*, 913 F.2d 1045 (2d Cir. 1990) ("*Weil II*"), *vacated and rev'd on this point*, 933 F.2d 106 (2d Cir. 1991) ("*Weil III*").

> The partial termination rule is designed to prevent forfeiture of pension benefits that have not yet vested and to prevent a windfall to the employer through a reversion of money on which the employer has paid no federal income taxes. Including vested terminees does not further the first policy since they forfeit no benefits. Furthermore, Congress has taken a more direct approach to remedy the potential for a tax-free corporate windfall. When a pension plan is terminated, any assets that revert to the employer are not only included in the employer's gross income, they are also subject to an additional excise tax. . . . . The Court therefore concludes that in applying both the significant percent and the significant number tests, only non-vested terminations are relevant.

764 F. Supp. at 1165.

The court below thought it "illogical" to consider fully vested participants and noted that, "[p]urely from a policy standpoint, the method adopted in *In re Gulf Pension Litigation* "best furthers the purposes of the partial termination statute." App. 8a. It nonetheless followed *Weil III*, rather than *Babb* and *In re Gulf Pension Litigation*, because it believed it was obligated to defer to the position taken by the IRS in the amicus brief submitted in *Weil III*. The court below made the following observation:

> Courts . . . have generally understood the [partial termination] statute's purposes to be: (1) to protect employee's legitimate expectation of pension benefits; and (2) to prevent employers from abusing pension plans to reap tax benefits. *Weil*, 933 F.2d at 106, 107; *Tipton & Kalmbach, Inc. v. Commissioner of Internal Revenue*, 83 T.C. 154, 161, 1984 WL 15598 (1984).
>
> The [Household] Plan argues that the counting of vested participants would further neither of these purposes. It states "[t]he partial termination remedy is

> aimed at protecting employees from a forfeiture of unvested benefits, and preventing employers from receiving sizable, tax-free reversions of surplus plan assets." From a policy standpoint, the Plan makes a logical argument. Vested participants do not need further protection for their pension benefits and do not benefit from a finding of partial termination. Their benefits, by virtue of vesting, are non-forfeitable. The employer gains nothing either. No monies revert back to it because the benefits are vested and non-forfeitable. We agree with the Plan's arguments. And, as the District Court stated, "if [we] were writing on a blank slate, [we] would be inclined to consider only non-vested employees" in deciding whether a partial termination had occurred. . . .
>
> * * * *
>
> In a thorough and thoughtful opinion, the District Court for the Southern District of Texas . . . agreed that neither policy was furthered by the counting of vested participants. . . . [I]t ruled that only non-vested participants would be counted. *In re Gulf Pension Litigation*, 764 F. Supp. 1149, 1165 (S.D. Tex. 1991).
>
> * * * *
>
> Purely from a policy standpoint, we believe that the method adopted in *Gulf Pension Litigation* best furthers the purposes of the partial termination statute. However, we are constrained in our analysis of the statute and must decide only if the IRS' construction is reasonable. *See Weil*, 933 F.2d at 107-08. We conclude that it is.

App. 7a-9a.

The purpose of a federal law is to establish uniform federal standards. Uniformity is particularly important with respect to ERISA because it impacts employee benefit plans nationwide. In fact, Congress intended for the courts to fashion a federal common law for ERISA matters. *See, e.g., Shaw v. Delta Airlines*, 463 U.S. 85, 105 & n.25 (1983); *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1502 (9th Cir. 1985).

Because of the conflicting decisions on the question presented herein, pension plans with participants in the geographical areas covered by the Fourth Circuit (and perhaps the Fifth) are subject to different directives than pension plans in the geographical areas covered by the Second and Seventh Circuits. Pension plans with participants nationwide cannot know which standard will be applied to them—it depends entirely on the court in which the suit is brought.

II. THE DECISION OF THE COURT BELOW IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN *CHRISTENSEN V. HARRIS COUNTY*.

In *Christensen v. Harris County*, 120 S. Ct. 1655, 1662 (2000), the Court underscored the fact that government agency interpretations of an ambiguous statute are entitled to the kind of deference described in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), only if they have "the force of law"—that is, if they were adopted through notice-and-comment rulemaking or formal adjudication. As explained in *Christensen*, 120 S. Ct. at 1662, a court should give deference to agency pronouncements that lack the force of law only in accordance with the standards set out *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

Chevron deference, when it applies, is mandatory, in the sense that the courts must accept any agency interpretation that is consistent with the statute and is otherwise "permissible" or "reasonable." *Chevron*, 467 U.S. at 844 (reasonable agency interpretation is given "controlling weight"). *Skidmore* deference, in contrast, rests in the sound discretion of the court. Agency interpretations under *Skidmore* are "not controlling upon the courts by reason of their authority," but rather are entitled to weight insofar as they have the "power to persuade." *Skidmore*, 323 U.S. at 140. *Skidmore* requires courts to consider a variety of factors associated with the agency's interpretation, such as the thoroughness and validity of its reasoning and its consistency over time, before deciding how much weight the interpretation should be given in any context. *Id.*

The court below mentioned neither *Chevron* nor *Skidmore*.[7] However, it clearly gave *Chevron* deference to the amicus curiae brief submitted to the Second Circuit in *Weil III*. It found the IRS' position to be "illogical" and said that, "[p]urely from a policy standpoint, we believe that the method adopted in *Gulf Pension Litigation* best furthers the purposes of the partial termination statute." App. 8a. It nonetheless found itself "constrained in [its] analysis of the statute and [required to] decide only if the IRS' construction is reasonable." App. 8a. This is *Chevron* deference.[8]

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[7] Although it was issued after *Christensen*, the decision of the court below did not mention *Christensen* either.

[8] The court in *Weil III* also gave *Chevron* deference to the position taken by the IRS in the amicus brief. It observed that it had concluded in *Weil II* that it "seemed logical . . . to consider only non-vested participants in a partial termination inquiry, since it was their rights to accrued benefits that were imperiled." *Weil III*, 933 F.2d at 109. It deferred to the position taken by the IRS in the amicus brief because it believed it was compelled to do so if it was a "permissible" interpretation of the partial termination statute. *Id.* at 110.

The position stated in the IRS' amicus brief in *Weil III* was not consistent with positions taken by the IRS at other times. The courts in *Weil II* and *Weil III* noted the following inconsistencies in positions taken by the IRS:

- in a determination sent to the plan in 1981, the IRS had considered only non-vested participants in concluding that no partial termination had occurred (*Weil III*, 933 F.2d at 110);

The opinion of the court below decides a federal question in a way that is directly contrary to this Court's opinion in *Christensen. Christensen* identifies "formal adjudication and notice-and-comment rulemaking" as the kinds of action entitled to *Chevron* deference, while indicating that agency interpretations that lack the "force of law," such as "interpretations contained in policy statements, agency manuals, and enforcement guidelines," "do not warrant *Chevron*-style deference." *Christensen*, 120 S. Ct. at 1662. *See also Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 137-38 n.9 (1997) (suggesting that *Chevron* deference applies to interpretations "embodied in any regulation or similar binding pronouncement"). An agency interpretation stated in an amicus brief clearly is not the kind of interpretation to which *Chevron* deference is due. It was not formulated after notice and opportunities for comment or as a result of formal adjudication. Therefore, giving *Chevron* deference to an amicus brief submitted on behalf of the IRS is in direct conflict with this Court's decision in *Christensen*.[9]

- an IRS agent had testified at deposition that the IRS, when examining the percentage of terminated participants, focuses on the percentage of participants discharged without vested benefits (*Weil v. Retirement Plan Admin. Comm. of the Terson Co.*, 913 F.2d 1045, 1051 (2d Cir. 1990 ("*Weil II*"), *vacated in part*, 933 F.2d 106, (2d Cir. 1991) ("*Weil III*"), and
- Form 5310, which a pension plan can use to request a determination from the IRS as to whether a pension plan has been partially terminated, asks an employer to provide, in addition to the total number of participants terminated, the number of participants terminated without full vesting (*Weil II*, 913 F.2d at 1051 n.2).

[9] In *Auer v. Robbins*, 519 U.S. 452 (1997), the Court gave *Chevron* deference to an interpretation stated in an amicus brief submitted to the Court by the Secretary of Labor. It found the Secretary's interpretation of the regulation, as stated in the amicus brief, to be "controlling unless ' "plainly erroneous or inconsistent with the regulation." ' " 519 U.S. at 461. *Auer* cannot be reconciled with *Christensen*. Under the rationale of

The instant Petition should be granted because the opinion of the court below decides a federal question in a manner that is directly contrary to this Court's opinion in *Christensen* and renders suspect the rationale of that case, as well as the rationales of *Chevron* and *Skidmore*.

III. THE COURT BELOW INCORRECTLY DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW THAT HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The opinion of the court below is of obvious importance to employers and employees nationwide. This Court has not yet had occasion to address the subject of how to determine if a "partial termination" has occurred and the lower courts are struggling mightily with this issue. The Household Plan respectfully submits that litigants and the lower courts need the prompt assistance of this Court to answer the important questions of statutory construction presented here.

A. The Court Below Incorrectly Decided That Fully Vested Participants Must Be Considered In A Partial Termination Analysis.

From its reading of *Weil III*, the court below gathered that the IRS took the position in an amicus brief submitted in that case that "both vested and non-vested participants should be counted." App. 6a. The court below found the IRS/*Weil III* position to be entitled to deference because, in its view, that

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Christensen, an interpretation stated in an amicus brief is entitled only to *Skidmore* deference. Furthermore, this case is distinguishable from *Auer* because the amicus brief deferred to by the court below was submitted to another court in another case and the court below never saw it. In additon, as explained in section III (A) of this Petition, the position stated in the amicus brief (as described in *Weil III*) is inconsistent with the applicable Treasury Regulation.

position is both consistent with the Treasury Regulation and "reasonable." App. 9a. The Court was wrong on both counts. The IRS/*Weil III* position conflicts directly with the Treasury Regulation and is not at all "reasonable." Accordingly, it is entitled to no deference even assuming, *arguendo*, that the *Chevron* deference test is applicable to an agency position stated in an amicus brief in another case.

In finding the IRS/*Weil III* position to be consistent with the Treasury Regulation, the court below noted that "[n]either the statute, its legislative history nor the Treasury Regulation differentiate between vested and non-vested participants." App. 9a. The court did not go far enough in its analysis. In fact, the IRS/*Weil III* interpretation conflicts directly with the applicable Treasury Regulation because it is a black-and-white rule that fully vested participants must be considered in every partial termination analysis. The Regulation expressly mandates a consideration of "all the facts and circumstances" in each case. It says:

> Whether or not a partial termination of a qualified plan occurs (and the time of such event) shall be determined by the Commissioner with regard to all the facts and circumstances in a particular case. Such facts and circumstances include: the exclusion, by reason of a plan amendment or severance by the employer, of a group of employees who have previously been covered by the plan; and plan amendments which adversely affect the rights of employees to vest in benefits under the plan.

Treasury Regulation 1.411(d)-2(b)(1), 26 C.F.R. § 1.411(d)-2(b)(1). *See also* Treasury Regulation 1.401-6(b)(2), 29 C.F.R. § 1.401-6(b)(2).[10]

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[10] In this case, it is particularly inappropriate to consider participants whose employment was terminated after the 1995 Plan amendment. Once all participants have been fully vested, the partial termination question is moot.

The court below found the IRS/*Weil III* position to be "reasonable" because the Treasury Regulation says a partial termination may occur when "a group of employees," previously covered by the plan, is excluded from the plan by reason of severance from employment. App. 9a. However, no court has ever found a partial termination occurred simply because a "group of employees" was excluded from the plan. *See, e.g., Halliburton*, 100 T.C. at 238-49. In *Halliburton*, the Tax Court expressly rejected the IRS' argument that the Court should use a "significant number" test, rather than a "significant percentage" test, when determining if a partial termination occurred. 100 T.C. at 234-36. Noting that the "significant number" test was first announced in an IRS revenue ruling, which is "only as persuasive as [its] reasoning and the precedents upon which [it] relies," the court in *Halliburton* could find no rationale for it at all. 100 T.C. at 232. No court has used the "significant number" test as a basis for finding that a partial termination occurred (or did not occur). *See In re Gulf Pension Litigation*, 764 F. Supp. at 1163-64 (refusing to find a partial termination even though 415 participants had been terminated). *See also Halliburton*, 100 T.C. at 250-52 (no partial termination even though more than 3,500 participants were laid off).[11]

If the court below had seen the amicus brief submitted for the IRS in *Weil III*, it would have noted that the amicus brief expressly states that the partial termination question is moot after all participants have been fully vested. The amicus brief submitted in *Weil III* states:

> The number, if any, of non-vested participants is relevant because if all of the terminated participants are vested, the question whether there has been a partial termination would be a moot point, since the benefits of terminated vested participants are nonforfeitable regardless of whether there has been a partial termination.

Amicus Brief submitted for IRS in *Weil III*, pp. 9-10.

[11] Federal courts consistently have held that a partial termination occurs if there has been a permanent reduction of a "significant percentage" of the plan participants because of a major corporate event.

The court below also found the IRS/*Weil III* position to be "reasonable" because "the exclusion of vested participants from the ratio calculation gives an inaccurate assessment of whether there has been a significant reduction in plan participation, the benchmark against which partial termination is measured." App. 9a. This statement disregards the fact that courts routinely exclude various kinds of participants from the partial termination analysis. *See, e.g., Halliburton,* 100 T.C. at 238, 245-49. They exclude those who died, retired at normal retirement age, voluntarily resigned, were terminated for cause or because of disabilities, were transferred to successor plans, or were rehired shortly after being laid off. *See Halliburton*, 100 T.C. at 238, 245-49; *Sea Ray,* 164 F.3d at 988; *Sage*, 845 F.2d at 891; *Kreis*, 833 F. 2d at 81-83; *Weil I*, 750 F.2d at 13; *In re Gulf Pension Litigation*, 764 F. Supp. at 1168.[12] If some participants can

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See, e.g., Administrative Comm. of the Sea Ray Employees' Stock Ownership and Profit Sharing Plan v. Robinson, 164 F.3d 981, 987 (6th Cir. 1999), *cert. denied sub nom. Robinson v. Administrative Comm. of Sea Ray Employees' Stock Ownership and Profit Sharing Plan*, 528 U.S. 114 (2000) ("*Sea Ray*"); *Halliburton*, 100 T.C. at 234-36; *Sage v. Automation, Inc. Pension Plan and Trust*, 845 F.2d 885, 890 (10th Cir. 1988); *Kreis v. Charles Townley, M.D. & Associates*, 833 F. 2d 74, 79 (6th Cir. 1987); *Babb*, 764 F.2d at 243-45; *Weil v. Retirement Plan Admin. Comm. for Terson Co.*, 750 F.2d 10, 12-13 (2d Cir. 1984) ("*Weil I*"); *Collignon v. Reporting Services Co.*, 796 F. Supp. 1136, 1141 (C.D. Ill. 1992); *In re Gulf Pension Litigation*, 764 F. Supp. at 1168; *Tipton & Kalmbach, Inc. v. Commissioner*, 83 T.C. 154 (1984); *Morales v. Pan Am. Life Ins. Co.*, 718 F. Supp. at 1302. As the Third Circuit observed in *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 151 (3d Cir. 1987), *aff'd in part and rev'd in part*, 489 U.S. 101 (1989), 489 U.S. 101 (1989), the appropriate focus of the inquiry is the "percentage of employees in the plan who were affected by the transaction said to constitute a partial termination."

[12] The *Halliburton* court explained that it was proper not to consider those who died, retired at normal retirement age, or were terminated for cause because:

be excluded without giving an "inaccurate assessment," there is no rationale for insisting on the inclusion of fully vested participants.

In short, the decision of the court below is simply wrong. There is no rational basis for considering fully vested participants when determining if a partial termination occurred. The IRS/*Weil III* position therefore is not entitled to judicial deference even if *Chevron* deference properly may be applied to an amicus brief submitted in another case.

B. The Court Below Incorrectly Decided That Terminations Caused By "Related" Corporate Events In Multiple Plan Years May Be Considered In A Partial Termination Analysis.

The court below held that "Matz can combine terminations from 1994, 1995 and 1996, provided that he show that the corporate events of those years were related." App. 11a. This decision ignores the plain language of the partial termination statute and the fact that the statute is part of the Internal Revenue Code, which imposes annual tax and reporting obligations on employers and their pension plans. The decision also places plan administrators in the untenable position of having to predict what future events might occur and, even if they know with certainty what will occur in the future, having to guess whether a court or the IRS will find those events were "related."

> The discontinuance of such employees' participation in the plan is deemed not to be attributable to Halliburton's reductions in force and so such employees are deemed not to have been affected by such action. . . . Moreover, the account balances of employees who died or retired at normal retirement age were fully vested upon occurrence of such events.

100 T.C. at 238 (emphasis added).

The partial termination statute provides that, if a partial termination has occurred, the plan must assure that "the rights of all affected employees to benefits accrued to the date of such termination, partial termination, . . . to the extent funded as of such date, or the amounts credited to the employees' accounts, are nonforfeitable . . . ." 26 U.S.C. § 411(d)(3) (emphasis added). This language indicates that a partial termination occurs in a single plan year, not over a period of years.[13]

The statutory references to "the date of such termination" and "as of such date" also indicate that a partial termination occurs as a result of a single event, rather than a series of "related" events occurring over an indefinite period of time. Accordingly, several courts have found that a "sudden and dramatic" change to the plan is a necessary predicate to a partial termination. *See Weil III*, 933 F.2d at 110; *Halliburton*, 100 T.C. at 230; *In re Gulf Pension Litigation*, 764 F. Supp. at 1169-70. *See also* Edward T. Veal & Edward R. Maciewicz, *Pension Plan Terminations* § 15.2.2, at 291 (1989) ("[f]or practical purposes, the key factor in determining whether a partial termination has occurred is the percentage of plan participants who separate from service within a short period of time as a result of a discrete event") (emphasis added).

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[13] In IRS General Counsel Memorandum 39310, 1984 IRS GCM LEXIS 184, the General Counsel of the IRS advised the Director, Employee Plans Technical and Actuarial Division, that:

> The tax rulings and regulations surrounding terminations serve a limited purpose. They appear in the context of a statutory and regulatory scheme which, recognizing the dangers that employer manipulation of pension benefits may create, conditions tax benefits (in particular, deductibility of employer contributions) upon compliance with rules designed to benefit employees. Under I.R.C. § 401(a)(7) and accompanying regulations . . . , there must be a full vesting of accrued benefits, to the extent funded, on the termination of the plan. Because a 'termination' can be either a complete or partial termination, if the plan meets the statutory standard then the benefits of participants in a 'partially terminated' portion of a plan would vest upon 'partial termination.'

1984 IRS GCM LEXIS 184, *13 (emphases added).

Pension plans and their sponsoring employers are required to file returns with the IRS on an annual basis, based on events that occurred during the previous year. Moreover, if a pension plan is not qualified for a particular year, the employer and the plan must pay income taxes for that year. Accordingly, IRS revenue rulings on partial terminations deal with individual plan years. *See* Rev. Rul. 72-439, 1972-2 C.B. 223, 73-284, 1973-2 C.B.139, and 81-27, 1981-1 C.B. 228. Similarly, IRS Form 5310, which is used to request an IRS determination about the qualified status of a plan upon its termination, asks for information on a plan year by plan year basis.

It therefore is not surprising that the IRS itself has taken the position that a court should consider only events that occurred in a single plan year. In *Halliburton*, the Tax Court discussed the fact that some of the participants in the Halliburton plan who had been laid off in 1986 were hired back during 1987 through 1989 and subsequently resumed participation in the plan. 100 T.C. at 246. Halliburton took the position that the rehired participants should be excluded from the partial termination calculation, but the IRS asserted they should be included because the court's analysis should be limited to events that occurred in 1986. *Id.* In support of its position, the IRS argued that "permitting the number of affected employees to be adjusted by the number of rehires would prolong and complicate the process of ascertaining whether a partial termination had occurred." *Id.*

The *Halliburton* court rejected the IRS' position, finding it was not obligated to consider the events of only one plan year in resolving the partial termination issue. *Id.* However, on this issue, the IRS was right. Expanding the time period beyond a plan year places plan administrators in an impossible spot. Pursuant to ERISA, they are obligated to resolve benefit claims within limited time periods.[14] However, if a partial termination can occur over multiple plan years and the claim is made during (instead of after) those years, the administrator cannot know, when the claim is made, if the claimant is entitled to additional benefits under a partial termination theory—a court or the IRS, or the plan itself, could later conclude that the claimant was "affected" by a partial termination based on events that subsequently occurred.[15] The aggregation of multiple plan years also creates other problems:

> [T]he plan sponsors cannot, in practice, delay a decision as to whether a partial termination has occurred for several years while they wait to discover what the trend of employment will be. The decision to fully vest workers who have left in a particular year must be made before forfeitures for that year are reallocated to the accounts of other participants. If the finding that a partial termination has occurred comes after the reallocation of forfeitures, the plan sponsor has little alternative to making additional contributions to the plan

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[14] Absent special circumstances requiring an extension of time, the plan administrator must notify the claimant of the plan's benefit determination within 90 days after receipt of the claim. 29 C.F.R. § 2560.503-1(e)(3). An extension of time cannot exceed 90 days from the end of the initial 90-day period. *Id.*

[15] In this case, Matz filed a claim for additional benefits in March 1995 and the Household Plan Administrative and Investment Committee denied that claim in April 1995. He now asserts he was "affected" by a partial termination that took place between September 1, 1994, and May 1, 1996. The Committee had no opportunity to consider the claim Matz is making in this case. Moreover, it is accused in this case of not recognizing in April 1995 that the Plan had been partially terminated because of "related" corporate events occurring between September 1, 1994, and May 1, 1996.

> to restore the account balances forfeited by terminated participants.

Veal & Maciewicz, *supra*, at 300-01.

These problems are exacerbated because the court below has provided no standard for determining whether corporate events are "related." Matz alleges that a series of corporate transactions occurring over a three-year period were "related" because they were "part of an overall plan to refocus [Household's] business and reduce costs." Complaint, ¶¶ 12, 13. If this is the test, virtually every corporate transaction is "related." At some level, every corporate transaction is the result of decision-makers acting in what they believe to be the best economic interests of the corporation.

In addressing "relate to" language in a different ERISA context, Justice Scalia said: "applying [a] 'relate to' provision according to its terms [is] a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else." *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring). *Accord*, *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 655 (1995). This comment is particularly apt in this context.

Plan administrators cannot know in a particular year whether events occurring in subsequent years will result in a partial termination. Moreover, assuming a long time period between a participant's termination and the recognition of a partial termination, the aggregation of plan years could have the effect of requiring a restoration of forfeitures. In the case of former employees, there may be an added practical problem of locating them in order to restore the forfeitures.

Worse, the plan could be retroactively disqualified, with adverse income tax consequences for both the employer and the employees participating in the plan since that time. *See,* *e.g.*, *Tipton*, 83 T.C. at 162; *Peter Boruta, M.D., P.C. v. Commissioner*, 55 T.C.M. (CCH) 670 (1988). It is important to remember that IRC § 411(d)(3) is a tax statute, administered by the IRS. The IRS retroactively disqualifies plans whose administrators did not recognize a partial termination had occurred and, therefore, did not grant nonforfeitable rights to discharged employees who were participating in the plan. *Id.* A finding that a plan was not qualified in a prior plan year could mean the employer's contributions to the plan may not be deducted on its federal income tax returns for that year and all subsequent years unless and until the discharged employees have been made whole and the plan regains its qualification. *See* 26 U.S.C. § 404(a)(5). In addition, employees participating in the disqualified plan could be taxed on the full amount in their accounts for that year and all subsequent years. *See* 26 U.S.C. § 402(b)(1).

The Court should grant this Petition to correct the errors of the court below on the important issues presented.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the opinion of the Seventh Circuit.

Respectfully submitted,

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February 5, 2001

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 00-1109

ROBERT J. MATZ, individually and on behalf of all others similarly situated,
Plaintiff-Appellee,

v.

HOUSEHOLD INTERNATIONAL TAX REDUCTION INVESTMENT PLAN,
Defendant-Appellant.

Argued May 17, 2000

Decided Sept. 21, 2000

Before BAUER, COFFEY and KANNE, Circuit Judges.

BAUER, Circuit Judge.

Robert J. Matz and other employees of Hamilton Investments, Inc. lost their jobs and the non-vested portions of their retirement benefit plan in 1994 when the company was sold. Matz filed suit on behalf of himself and other terminated employees who were participants in the ERISA pension plan, claiming entitlement to the benefits as a result of a partial termination of the plan. To prove partial termination, he seeks to count both vested and non-vested participants and, because he believes that the partial termination was the result of a multi-year corporate reorganization, to aggregate terminations that occurred in multiple plan years. The District Court ruled that he could do both, and certified the issues to us for interlocutory appeal. We affirm.

I. BACKGROUND

In 1994, Household International, Inc. was the parent corporation of a varied group of companies. Its portfolio included mortgage companies, banking institutions, retail securities brokerages, insurance businesses and credit card companies. In August, 1994, Household began selling off some of its subsidiaries, beginning with Hamilton Investments, Inc., the company for which Robert Matz worked from March 28, 1989 until his termination on September 1, 1994.

Hamilton, through its parent corporation Household, provided a retirement benefit plan ("the Plan") to its employees. It was an employee benefit plan within the meaning of 29 U.S.C. § 1002(2)(A). The Plan allowed participants to make payroll contributions which were matched by contributions from Hamilton. Although the participant's contributions vested immediately, Hamilton's contributions were subject to deferred vesting. Section 14.1 of the Plan provided that a participant became vested in Hamilton's contributions at a rate of 20% per year. Thus, a participant had to remain with Hamilton for five years before he became fully vested. If his service to the company ended before that time, he forfeited the non-vested portion of Hamilton's contribution.

When Matz's job ended he had a 60% vested benefit in his employer's matching contribution. He elected to take a distribution and was paid $27,914.10, which represented 100% of his contributions to the Plan and 60% of Hamilton's contributions. The remaining 40%, $7,289.92, was forfeited and used by Household to reduce its matching contributions.

Matz sues to recover his forfeited amount. If he can prove that there was a termination or partial termination of the Plan,[1] ERISA affords him relief. 26 U.S.C. § 411(d)(3) provides:

> A trust shall not constitute a qualified trust under § 401(a) unless the plan of which such trust is a part provides that—
>
> A. Upon its termination or partial termination . . . the rights of all affected employees to benefits accrued to the date of such termination, partial termination or discontinuance, to the extent funded as of such date, or the amounts credited to the employee's accounts are nonforfeitable.

ERISA does not, however, define what constitutes a partial termination. Treasury Regulation § 1.411(d)-2(b)(1) provides some guidance:

> Whether or not a partial termination of a qualified plan occurs (and the time of such event) shall be determined by the Commissioner with regard to all the facts and circumstances in a particular case. Such facts and circumstances include: the exclusion, by reason of a plan amendment or severance by the employer, of a group of employees who have previously been covered by the plan; and plan amendments which adversely affect the rights of employees to vest in benefits under the plan.

(emphasis added).

Matz alleges that a partial termination of the Plan occurred beginning in August, 1994 (with the sale of Hamilton) and ending in May, 1996. During that period, Household discontinued or sold Household Mortgage Services, Inc., various branches of Household Bank, F.S.B., and Alexander Hamilton Life Insurance Company. Matz believes that this series of corporate transactions were part of a single reorganization plan and resulted in the Plan's partial termination. For that reason, he seeks to combine all of the terminations by Household in all of those years. He also seeks to count all fully vested employee terminations as well as non-vested employee terminations.

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[1] There is no dispute that the Plan continued after the sale of Hamilton. Thus, our inquiry focuses on the issue of partial termination.

The Plan, by contrast, contends that a partial termination analysis should look at individual plan years, not aggregated years. Furthermore, it argues that aggregation is inappropriate because there was no corporate reorganization that would justify such an approach. It also asks that only non-vested participants be counted. Finally, the Plan contends that any partial termination analysis must end on September 30, 1995, the date it issued a plan amendment vesting, fully and immediately, all participants.[2] Pointing to the language of 26 U.S.C. § 411(d)(3), the Plan states that participants who separated from service after September 30, 1995 cannot be "affected employees" because all Plan accounts became nonforfeitable at that time.

The parties briefed the issues to the District Court. The court, after careful analysis, ruled that both vested and nonvested participants could be counted to determine whether a partial termination occurred and that Matz could combine all terminations for 1994 through 1996. *Matz v. Household International Tax Reduction Investment Plan, 1998 WL 851491 (N.D.Ill.1998); Matz v. Household International Tax Reduction Investment Plan, 1999 WL 754659 (N.D.Ill.1999).* Upon the Plan's motion, the rulings were certified for interlocutory appeal. Now before us are the questions: (1) whether, for purposes of determining if the Plan was

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[2] The amendment provides that "if a Participant's employment with [Household and its affiliates] is terminated for any reason on or after September 30, 1995 he shall be 100% vested in his account."

"partially terminated," the court's analysis should include fully-vested employees terminated after the 1995 Plan amendment; and (2) whether the plaintiff's partial termination analysis may include terminations that take place over multiple (here, three) plan years. We affirm the District Court.

II. DISCUSSION

The question of whether a partial termination has occurred is a question of law subject to de novo review. *Sage v. Automation, Inc. Pension Plan and Trust*, 845 F.2d 885, 890 (10th Cir. 1988). Although many courts have addressed the issue of partial termination, few have addressed the questions of whether fully vested participants must be counted and whether the counting period is an individual plan year or the aggregation of multiple plan years. Indeed, they are issues of first impression to this court. We find that Matz has standing to raise these issues and address each one in turn.

A. Counting Of Vested And Non-Vested Participants

When interpreting congressional statutes, we look first at the plain language of the statute. See *Reves v. Ernst & Young*, 507 U.S. 170, 177, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993). If the language is clear and unambiguous, we apply the statute so as to give effect to its plain meaning. *United States v. Hayward*, 6 F.3d 1241, 1245 (7th Cir.1993). We cannot do that here because, although 26 U.S.C. § 411(d)(3) refers to a partial termination, it does not define it. Nor does it provide us with the framework for an analysis. Thus, we must search the legislative history for instruction.

The legislative history provides little more guidance than that found in the statute. The House and Senate Reports state only that "[e]xamples of a partial termination might include, under certain circumstances, a large reduction in the work force, or a sizable reduction in benefits under the plan." H.R.Rep. No. 807, 93rd Cong., 2d Sess., reprinted in 1974

U.S.C.C.A.N. 4670, 4731; S.Rep. No, 383, 93rd Cong.2d Sess., reprinted in 1974 U.S.C.C.A.N. 4890, 4935. Although this is somewhat more helpful, it still does not provide us with a clear standard by which to judge a particular case.

Our sister circuit struggled with the same dilemma before inviting an amicus brief from the IRS. See *Weil v. Retirement Plan Administrative Committee*, 933 F.2d 106, 109-10 (2nd Cir.1991) ("*Weil III*"). The *Weil III* decision, finding that vested and non-vested participants must be counted when determining whether a partial termination occurred, was the culmination of several decisions by the District Court and the Second Circuit. Initially, the District Court ruled that a partial termination had not occurred. *Weil*, 577 F.Supp. 781 (S.D.N.Y.1984). The Second Circuit reversed. *Weil*, 750 F.2d 10 (2d Cir.1984) ("*Weil I*"). On remand, the District Court, counting both vested and nonvested participants, found that a partial termination had occurred. *Weil*, 1988 WL 64862 (S.D.N.Y.1988). The Second Circuit reversed again, holding that only non-vested participants should be considered. *Weil*, 913 F.2d 1045, 1050-51 (2nd Cir.1990) ("*Weil II*").

On rehearing, the *Weil III* court had the benefit of the IRS' position of the issue. Giving "great weight" and deference to the IRS' view that both vested and non-vested participants should be counted, the Second Circuit vacated, in part, its ruling in *Weil II* and held that both classes of participants were to be considered in a partial termination analysis. *Weil*, 933 F.2d at 110. In so doing, the court found that the IRS' interpretation was reasonable and judicial deference was required as the IRS was the agency responsible for administering the partial termination statute. *Id.*

"Courts have generally held that termination of a number of employees does not constitute a 'partial termination' unless there is a significant reduction in plan participants." *Matz*, 1998 WL 851491, *2. To determine whether there is a significant reduction in plan participants, courts apply a "significant percentage" test. *Kreis v. Charles O. Townley, M.D. & Associates*, 833 F.2d 74, 79 (6th Cir.1987). Partial termination is measured by using the ratio of terminated plan participants over total plan participants.

Matz urges us to include all terminated participants (vested and non-vested) in the numerator, while the Plan asks us to consider only the non-vested participants in the top of the equation. Both claim that their method best furthers the purposes of the statute. Once again, however, both the statute and its legislative history are silent as to the purpose of the partial termination statute. Courts, though, have generally understood the statute's purposes to be: (1) to protect employees' legitimate expectation of pension benefits; and (2) to prevent employers from abusing pension plans to reap tax benefits. *Weil*, 933 F.2d at 106, 107*; Tipton & Kalmbach, Inc. v. Commissioner of Internal Revenue,* 83 T.C. 154, 161, 1984 WL 15598 (1984).

The Plan argues that the counting of vested participants would further neither of these purposes. It states "[t]he partial termination remedy is aimed at protecting employees from a forfeiture of unvested benefits, and preventing employers from receiving sizable, tax-free reversions of surplus plan assets." From a policy standpoint, the Plan makes a logical argument. Vested participants do not need further protection for their pension benefits and do not benefit from a finding of partial termination. Their benefits, by virtue of vesting, are nonforfeitable. The employer gains nothing either. No monies revert back to it because the benefits are vested and non-forfeitable. We agree with the Plan's arguments. And, as the District Court stated, "if [we] were writing on a blank slate, [we] would be inclined to consider only nonvested employees" in deciding whether a partial termination had occurred. However, we are not writing on a clean slate.

We are not alone in our view or our holding. The District Court for the Eastern District of Louisiana ruled that both vested and non-vested terminees must be considered, "[e]ven though the issue of partial termination affects only nonvested participants." *Morales v. Pan American Life Insurance Company*, 718 F.Supp. 1297, 1302 (E.D.La.1989). Although the District Court's decision was appealed, the Fifth Circuit did not decide the issue, holding instead that plaintiff Morales, a vested employee, did not have standing to raise the issue on behalf of the non-vested employees. *Morales v. Pan American Life Insurance Company*, 914 F.2d 83, 86 (5th Cir.1990).

In a thorough and thoughtful opinion, the District Court for the Southern District of Texas also agreed that neither policy was furthered by the counting of vested participants. But, it ruled that only non-vested terminees would be counted. *In re Gulf Pension Litigation*, 764 F.Supp. 1149, 1165 (S.D.Tex.1991). Realizing that approach would skew the percentage calculation and cause it to be artificially low (thereby increasing the chances of finding that there had not been a significant reduction in plan participants) the court excluded vested participants from both halves of the ratio. *Id.* at 1165 n. 10. Having calculated in this manner, the court found a partial termination of the plan. On appeal, the Fifth Circuit did not consider whether a partial termination occurred and affirmed on other grounds. *Borst v. Chevron Corporation*, 36 F.3d 1308, 1314, n. 11 (5th Cir.1994) ("Because we do not consider whether or not a partial vertical (or horizontal) termination occurred, the district court's ruling on this issue is not conclusive between the parties.").

Purely from a policy standpoint, we believe that the method adopted in *Gulf Pension Litigation* best furthers the purposes of the partial termination statute. However, we are constrained in our analysis of the statute and must decide only whether the IRS' construction is reasonable. See *Weil*, 933

F.2d at 107-08. We conclude that it is. Neither the statute, its legislative history nor the Treasury Regulation mentioned above differentiate between vested and non-vested participants. Indeed, the Treasury Regulation says that a partial termination may occur when "a group of employees," previously covered by the plan, are excluded from the plan by reason of a severance from employment.

A finding of reasonableness is also supported by the fact that the exclusion of vested participants from the ratio calculation gives an inaccurate assessment of whether there has been a significant reduction in plan participation, the benchmark against which partial termination is measured. For the calculation to be accurate, the circumstances as a whole must be considered. This, we think, buttresses a finding that vested participants must be included.

"To uphold [the agency's interpretation] we need not find that [its] construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings . . . We need only conclude that it is a reasonable interpretation of the relevant provisions." *Weil III*, 933 F.2d at 107-08 (internal quotation marks and citations omitted.). For the above reasons, we find that there is a factual basis for finding that the IRS' interpretation of the statute is reasonable. That is the only question on which we must rule. The order of the District Court, finding that both vested and non-vested terminees must be considered in its partial termination analysis, is affirmed.[3]

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[3] We make a special point of noting, for the sake of clarity, that employees who were vested in 1995 by virtue of the Plan amendment are to be counted. The fact that they vested because of the Plan amendment and not because of years of service is of no consequence.

B. Aggregation Of Multiple Plan Years

We next turn to the question of whether terminations occurring in multiple plan years can be combined in determining partial termination. Initially, we note that this issue has been addressed by only two other courts (excluding the District Court below) and both have found that it is permissible to aggregate terminations for multiple years. *Weil*, 750 F.2d at 13, n. 2; *Gulf Pension Litigation*, 764 F.Supp. at 1167-68.[4] We add our voice to theirs.

Matz argues that it is proper to combine all participant terminations in 1994, 1995 and 1996 because Household engaged in a corporate reorganization during that time.[5] The Plan counters by arguing that because this a tax event, the relevant period should be one year, as are tax years. It also argues that "[a]ll of the published Revenue Rulings dealing with the issue of partial terminations" examined only terminations occurring within a single plan year. We note, however, that in all of the decisions cited by the Plan, the event that affected the plan participants occurred within one year. Thus, those cases are inapposite and unpersuasive in our analysis.

Neither the statute nor its legislative history specify whether aggregation is permissible. The IRS has taken no position on the issue and because of that we receive no guidance from it. The only instruction we have comes from Treasury Regulation § 1.411(d)-2(b)(1), which provides that we must consider "all of the facts and circumstances in a particular case." No framework is provided beyond that.

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[4] In dicta, the United States Tax court stated "we do not agree that we should limit ourselves to considering the events of only one plan year in resolving the partial termination issue, as events bearing on such issue may extend over more than one year." *Halliburton v. CIR*, 100 T.C. 216, 246, 1993 WL 83409 (1993).

[5] The issue of whether the defendant's events of 1994, 1995 and 1996 were a corporate re-organization or a corporate event is not before this court and we do not decide that issue.

We hold that because there is nothing in the language of the rule itself that requires a significant corporate event to occur within a plan year, Matz can combine terminations from 1994, 1995 and 1996, provided that he show that the corporate events of those years were related. We believe this view reflects the realities of the modern corporate world. Mergers and corporate reorganizations have grown into large and complex events, *see e.g., In re Gulf Pension Litigation*, 764 F.Supp. 1149, and often cannot be completed in one year. Furthermore, to establish a rigid rule that only terminations in individual plan years can be counted allows an unscrupulous employer to terminate some participants in December of one year and January of the next year, thereby eviscerating both the purpose of protecting employee benefits and the purpose of prohibiting employers from reaping unfair tax benefits. We are convinced that the requirement that the multiple year terminations be proven related prevents a plaintiff from gaining undue advantage too.

III. CONCLUSION

For the foregoing reasons, the orders of the District Court, holding that both vested and nonvested participants both be counted and that multiple plan years may be aggregated, in considering whether the Plan was partially terminated, are affirmed.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
N.D. ILLINOIS
EASTERN DIVISION

No. 96 C 1095

ROBERT J. MATZ, Individually and on Behalf of all others Similarly Situated,

Plaintiff,

v.

HOUSEHOLD INTERNATIONAL TAX REDUCTION INVESTMENT PLAN,

Defendant.

Nov. 30, 1998

MEMORANDUM OPINION AND ORDER

GOTTSCHALL, J.

Plaintiff Robert J. Matz is seeking to bring a class action against the Household International Tax Reduction Investment Plan ("the Plan") under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq*. He alleges that he is entitled to accelerated vesting of his pension benefits because his firing by Hamilton Investments, Inc. ("Hamilton"), a wholly owned subsidiary of Household International, Inc. ("Household"), was part of a corporate reorganization that constituted a "partial termination" under the Plan and 26 U.S.C. § 411(d)(3). Matz purports to bring this action on behalf of a class consisting of other employees of Household and its subsidiaries who were also denied vesting under the alleged partial termination. The parties agreed to brief preliminary issues before addressing class certification. Currently before the court is the Plan's motion requesting that this court find that (1) employees who were terminated after September 1995, when the Plan was revised to give full vesting to terminated employees, shall not be considered for the purposes of determining if a partial termination occurred and (2) such employees may not be part of the class. For the reasons set forth below, the motion is granted in part and denied in part.

BACKGROUND

Matz was employed by Hamilton from March 28, 1989 through September 1, 1994. As an employee of Hamilton, Matz participated in the Plan. The Plan is an employee benefit plan within the meaning of section 3(2)(A) of ERISA, 29 U.S.C. § 1002(2)(A). Matz elected to make payroll contributions to the Plan. His contributions were matched by contributions from Hamilton.

The Plan contained a deferred vesting schedule for Hamilton's matching contributions. Section 14.1 of the Plan provides that a participant becomes vested at a rate of 20% per year, thus requiring five years of service for the participant to be 100% vested. However, Section 19.2 of the Plan provides that "in the case of the termination of the Plan by Household International, Inc . . . . or a partial termination of the Plan with respect to a group of participants, the account balance of each affected participant shall become 100% vested." Presumably, the Plan contains this language in order to comply with 26 U.S.C. § 411(d)(3), which requires an employee benefit plan to vest fully the benefits of participants when a plan is terminated or when there is a partial termination of the plan.

On September 1, 1994, when Matz was terminated, he had a 60% vested benefit in the employer's matching contributions to the Plan. After his termination from Hamilton, Matz received a distribution of his entire vested benefits in the amount of $27,914.10. This distribution was equal to 100% of the account balance attributable to Matz' own contributions to the Plan and 60% of the account balance attributable to the matching contributions from Hamilton. The remaining 40%, $7,289.92, was forfeited and was used by Household to reduce its matching contributions.

In September 1995, Household amended the Plan to eliminate the deferred vesting schedule and vest fully all participants. In particular, the Plan was amended to provide that "if a Participant's employment with [Household and its affiliates] is terminated for any reason on or after September 30, 1995 he shall be 100% vested in his account."

In this action Matz alleges that a partial termination of the Plan occurred between August 1994 and May 1996 and that he and other class members are thus entitled to 100% vesting in their account balances. Matz claims that he and other class members were terminated as part of Household's reorganization plan. Matz contends that during the course of an approximately two and one-half year period, Household divested itself of certain non-core subsidiary businesses, such as mortgage, thrift banking, retail securities brokerage and insurance businesses. The Plan denies that a partial termination occurred and argues that the various business transactions between August 1994 and May 1996 were isolated transactions and not part of a reorganization plan.[1]

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[1] The question of whether or not there was a reorganization plan is important because it may affect the determination whether a "partial termination" has occurred. As described infra, to establish a partial termination, Matz needs to prove that a significant percentage of plan participants were terminated. If, instead of relying only on the terminations resulting from the sale of Hamilton, Matz can aggregate the terminations from all transactions during the purported reorganization, it is more likely Matz will be able to show that a significant percentage of

Courts have generally held that termination of a number of employees does not constitute a "partial termination" unless there is a significant reduction in plan participants. In determining whether there is a significant reduction in plan participants, courts often have applied a "significant percentage" test. See *Kreis v. Charles O. Townley, M.D. & Assoc.*, 833 F.2d 74, 79 (6th Cir.1987). For the significant percentage test, courts look to see if a significant percentage of plan participants have been terminated.

In actions such as this one, calculating the percentage reduction is not straightforward because the parties often disagree on how to measure the number of plan participants terminated.[2] Here, Matz argues that both vested and non-vested plan participants who were terminated should be counted in determining if there was a significant reduction in plan participation. The Plan disagrees. In particular, in the present motion, the Plan argues that employees who were terminated after September 30, 1995 should not be counted for the purpose of determining if a partial termination occurred. As noted above, an amendment to the Plan granted full vesting to employees who were terminated after September 30, 1995.

This motion raises only the narrow issue of whether employees terminated after September 30, 1995 may be counted for the purposes of the partial termination analysis and whether they may be members of the class represented by

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plan participants were affected and that a partial termination occurred. However, the question whether the various transactions may be aggregated for the purpose of determining if a partial termination occurred is not currently before the court.

[2] For example, here, the parties dispute whether Matz can aggregate terminations over the course of approximately two and one-half years to come up with a greater percentage reduction or whether it is appropriate to consider only those employees who were terminated along with Matz when Hamilton was sold.

Matz. The parties are not at this time seeking a determination whether a partial termination occurred or whether the various transactions between August 1994 and May 1996 may be aggregated for deciding if a partial termination has occurred.

DISCUSSION

The relevant statute and regulation do not provide any guidance on whether fully vested employees who are terminated should be counted in determining if a partial termination has occurred. Indeed, the statute and regulation offer little assistance for analyzing whether a partial termination has occurred. Although 26 U.S.C. § 411(d)(3) refers to "partial termination," it does not define the term:

> a trust shall not constitute a qualified trust under section 401(a) unless the plan of which such trust is a part provides that—
>
> (A) upon its termination or partial termination,
>
> * * *
>
> the rights of all affected employees to benefits accrued to the date of such termination, partial termination, or discontinuance, to the extent funded as of such date, or the amounts credited to the employees' accounts, are nonforfeitable.

26 U.S.C. § 411(d)(3).

The relevant Treasury Regulation is not significantly more helpful:

> Whether or not a partial termination of a qualified plan occurs (and the time of such event) shall be determined by the Commissioner with regard to all the facts and circumstances in a particular case. Such facts and circumstances include: the exclusion, by reason of a plan amendment or severance by the employer, of a group of employees who have previously been covered by the

> plan; and plan amendments which adversely affect the rights of employees to vest in benefits under the plan.

Treas. Reg. § 1.411(d)-2(b)(1).

The legislative history of § 411(d)(3) likewise provides little insight into what constitutes a partial termination. The House and Senate Reports state that "[e]xamples of a partial termination might include, under certain circumstances, a large reduction in the work force, or a sizable reduction in benefits under the plan." H.R .Rep. No. 807, 93rd Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 4670, 4731; S.Rep. No. 383, 93rd Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 4890, 4935.

Few courts have addressed whether fully vested employees who are terminated should be counted in a partial termination analysis.[3] In *Weil v. Retirement Plan Admin. Comm.,* 933 F.2d 106, 109 (2d Cir.1991) (*"Weil III"*), the Second Circuit, on rehearing, held that vested as well as non-vested plan participants must be counted when determining if a partial termination occurred. 933 F.2d at 109-10. Weil III was the culmination of several decisions by the district court and the Second Circuit. Initially, the district court ruled that a partial termination had not occurred. *Weil,* 577 F.Supp. 781 (S.D.N.Y.1984). The Second Circuit reversed. 750 F.2d 10 (2d Cir.1984) (*"Weil I"*). On remand, the district court found that a partial termination had occurred. In determining that a partial termination occurred, the district court included both vested and non-vested participants in its calculation of the percentage of participants affected by the corporate reorganization. *Weil,* 82 Civ. 8468, 1988 WL 64862 (S.D.N.Y. Jun.15, 1988). The Second Circuit reversed, finding that no partial termination had occurred. *Weil,* 913

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[3] The parties have not cited to and the court has not found any partial termination cases in which a portion of the plan participants terminated were granted full vesting by an amendment to the plan.

F.2d 1045 (2d Cir.1990) (*"Weil II"*). The court of appeals held that the district court should have considered only non-vested participants in determining if a significant reduction in plan participation had occurred. In reaching this conclusion, the court stated

> As the district court herein recognized, it "seems logical" to consider only non-vested participants in determining whether a partial termination has occurred, since these are the employees whose pension benefits are most affected by a termination. Vested participants who are discharged also are affected in that they are not eligible for future employer contributions. Nonetheless, the legislative history of the partial termination provisions suggest that one of Congress's concerns was to prevent the forfeiture of unvested pension benefits, and we do not believe that Congress also intended to insure future plan participation for those whose benefits already had fully vested. Moreover, to the extent that the partial termination rules are designed to prevent employers from creating pension plans for the purpose of evading tax liability, this interest would not seem to be implicated with respect to participants whose benefits have completely vested.

Weil II, 913 F.2d at 1050-51 (citations omitted).

On rehearing, the Second Circuit vacated in part its decision in *Weil II* and found that a partial termination had occurred. The court reviewed the language of the statute, the Treasury Regulation, and the legislative history concerning partial termination and concluded that the legislative intent behind § 411(d)(3) is ambiguous. *Weil III*, 933 F.2d at 109. The court then examined the construction of § 411(d)(3) by the Internal Revenue Service (IRS), which is the agency responsible for administering the partial termination statute.[4]

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[4] The IRS provided its interpretation of the statute in an amicus brief, which was submitted after the decision in *Weil II*.

The court noted that when Congress' intent for a statutory provision is ambiguous, a court should defer to the construction by the administering agency if it is a "permissible construction of the statute." *Weil III*, 933 F.2d at 107-08 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, (1984). The IRS stated that its long-standing position is that all terminated participants, both vested and non-vested, should be counted in determining if a partial termination has occurred. The court found that the IRS' construction was reasonable in light of the statute's silence and the examples provided in the House and Senate Reports ("a large reduction in the work force, or a sizable reduction in benefits under the plan"). 933 F.2d at 110. The court noted that these reports suggest that "Congress regarded a partial termination to be a sudden and dramatic change in the plan as a whole." *Id.* The court also noted that neither the statute, the Treasury Regulation, nor the House and Senate Reports distinguished between vested and non-vested participants.

Like the court in *Weil III*, this court finds that the purpose behind the partial termination statute is ambiguous. Courts have identified two possible purposes for the partial termination statute: (1) protecting the pension benefits of non-vested participants; and (2) preventing employers from abusing pension plans to reap tax benefits. See *Weil III*, 933 F.2d at 109. From a policy standpoint, it is unclear why courts should consider vested plan participants who are terminated in analyzing if a partial termination has occurred. Vested participants do not need further protection for their pension benefits (and of course do not "benefit" from a finding that a partial termination occurred), and an employer cannot reap tax benefits from terminating vested participants because vested participants do not forfeit any pension benefits to the employer. See *In re Gulf Pension Litig.*, 764 F.Supp. 1149, 1165 (S.D.Tex.1991) (noting that neither policy furthered by counting vested terminees in analyzing if partial termination occurred), *aff'd, Borst v. Chevron Corp.*, 36 F.3d 1308 (5th Cir.1994). If this court were writing on a blank slate, it would be inclined to consider only non-vested employees who were terminated in considering if a partial termination had occurred.

However, this court is not free to impose its own construction on the statute. Instead, this court must determine only whether the IRS' construction is reasonable. As was made clear in *Weil III*, the IRS has interpreted the partial termination statute as requiring that "all terminated participants, both vested and non-vested, should be counted in determining whether a partial termination has occurred. The IRS thus measures partial terminations using the ratio of terminated plan participants (vested and non-vested) over total plan participants." *Weil III*, 933 F.2d at 106 (quotation omitted). Like the court in *Weil*, this court finds that the interpretation by the IRS is reasonable. The examples of partial terminations given in the House and Senate Reports (such as "a large reduction in the work force") "suggest that Congress regarded a partial termination to be a sudden and dramatic change in the plan as a whole." *Weil III*, 933 F.2d at 110. The reports do not distinguish between vested and non-vested participants, i.e., the example does not refer to a large reduction in non-vested employees.

The Plan argues that the situation here is different from *Weil*. The Plan argues that, in contrast to *Weil*, where there was a mix of vested and non-vested participants who were terminated, here, after September 30, 1995, there were no longer any non-vested participants. Consequently, for employees terminated after September 30, 1995, there is no need for a partial termination remedy. However, this argument confuses the consequences of a partial termination—full vesting—with the standards for determining if a partial termination has occurred. The IRS has construed the partial termination statute so that the trigger for a partial termination is a significant reduction in plan participation, without regard to whether the terminated participants are vested or non-vested. If Matz' view of the case is correct—that the various corporate transactions between August 1994 and May 1996 were part of a larger corporate reorganization plan - then the effect of the September 1995 amendment in the plan was merely to increase the proportion of vested to unvested participants who were affected by the reorganization plan. Of course, the Plan may show that the various transactions were not part of a larger plan; that issue is not yet before the court.[5] Nevertheless, assuming for the purposes of this motion that there was a reorganization plan, the situation here is not significantly different from that in *Weil*. As in *Weil*, there were vested and non-vested participants affected by the corporate actions.

Therefore, the Plan's motion is denied to the extent that it seeks to exclude plan participants who were terminated after September 1995 from the analysis whether a partial termination has occurred. However, the Plan's motion is granted to the extent that it seeks to exclude from the purported class participants who were terminated after September 1995. Matz failed to respond to this part of the motion, perhaps due to a belief that it was not properly raised. This court concludes that the matter was properly raised and that there is no basis for including such participants in the class. Due to the September 1995 amendment, these employees were fully vested and thus these employees have suffered no injury that can be redressed by this action.

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[5] If the Plan establishes that the various transactions and resulting terminations were not part of a larger plan, then only those participants terminated from Hamilton with Matz will be counted for the partial termination analysis.

APPENDIX C

UNITED STATES DISTRICT COURT
N.D. ILLINOIS

No. 96 C 1095

ROBERT J. MATZ, Individually and On Behalf of All Others Similarly Situated,

Plaintiff,

v.

HOUSEHOLD INTERNATIONAL TAX REDUCTION INVESTMENT PLAN,

Defendant.

Sept. 8, 1999

MEMORANDUM OPINION AND ORDER

GOTTSCHALL, District J.

Plaintiff Robert J. Matz is seeking to bring a class action against the Household International Tax Reduction Investment Plan ("the Plan") under the Employee Retirement Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq*. The Plan is an employee pension benefit plan within the meaning of 29 U.S.C. § 1002(2)(A). Between August 1994 and May 1996, Matz and a number of other employees of Household International, Inc. or its subsidiaries lost their jobs due to a series of corporate transactions. Matz contends that these corporate transactions were part of a single reorganization plan that resulted in a "partial termination" of the Plan under 26 U.S.C. § 411(d)(3) and the Plan. At the time they lost their jobs, Matz and some other employees were not fully vested in the portion of their account balances resulting from Household's matching contributions to the Plan. When Matz and other affected employees lost their jobs, the nonvested portions of their Plan accounts were forfeited. If Matz establishes that a partial termination occurred, then he and other affected Plan participants will be entitled to full vesting of their Plan account balances.

With this court's approval, Matz and the Plan entered into an agreement under which the parties would brief and this court would resolve two issues before undertaking full discovery and addressing class certification: (1) whether fully vested Plan participants (and in particular those participants who were fully vested because of an amendment to the Plan granting full vesting to all participants as of September 30, 1995) may be counted to determine if a partial termination occurred; and (2) whether Matz may consolidate plan years to establish that a partial termination occurred. On November 30, 1998, this court ruled that fully vested Plan participants, including participants who were fired after September 30, 1995, would be counted to determine if a partial termination occurred. Currently before the court is the Plan's motion for summary adjudication of the second issue.[1] In addition, at the end of this opinion, this court will address the Plan's motion to certify the November 30, 1998 order for interlocutory appeal.

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[1] Matz filed a Motion to Strike Sections II and III of Defendant's Memorandum of Points and Authorities in Support of Second Motion for Summary Adjudication of Issues. Matz objected to the Plan's attempt to raise the issues of class certification and class damages. As this court indicated in its order of January 9, 1999, the only issue that will be addressed now is whether Matz may aggregate terminations from multiple plan years to establish a partial termination. The court will ignore those sections of the Plan's memorandum that are irrelevant to this issue. Therefore, the motion to strike is denied as moot.

BACKGROUND

In August 1994, Household sold the assets of its subsidiary, Hamilton Investment, Inc. In December 1994, Household discontinued Household Mortgage Services Inc. In February 1995, Household sold its Maryland, Virginia and California branches of Household Bank, F.S.B. Also in 1995, Household sold its Ohio and Indiana branches of Household Bank, F.S.B. In October 1995, Household sold Alexander Hamilton Life Insurance Co. In May 1996, Household sold the Illinois branches of Household Bank, F.S.B. As noted above, Matz argues that these transactions were part of a single reorganization plan. Household denies that these transactions were related or were part of a single reorganization plan.

Matz was terminated from his position at Hamilton on September 1, 1994. Prior to his termination, Matz had participated in the Plan. Matz made payroll contributions to the Plan, which were matched by contributions from Hamilton. The Plan contained a deferred vesting schedule for the employer's matching contributions. Section 14.1 of the Plan provides that a participant becomes vested at a rate of 20 percent per year, thus requiring five years for the participant to become fully vested. At the time of his termination, Matz was 60 percent vested in Hamilton's matching contributions to the Plan. Thus, upon his termination, Matz received a distribution of $27,914.10, which was equal to the sum of 100 percent of the account balance attributable to his own contributions and 60 percent of the account balance attributable to the matching contributions from Hamilton. The remaining 40 percent of the balance attributable to Hamilton's matching contributions, $7,289.92, was forfeited.

The Plan provides that "in the case of the termination of the Plan by Household International, Inc. . . . or a partial termination of the Plan with respect to a group of participants, the account balance of each affected participant shall become

100% vested." The Plan contains this provision because of 26 U.S.C. § 411(d)(3), which requires an employee benefit plan to vest fully the benefits of plan participants when there is a termination or partial termination of the plan.

DISCUSSION

As discussed in the November 30, 1998 order, neither § 411(d)(3), the legislative history of § 411(d)(3), nor the relevant Treasury Regulation offers much guidance for determining if a partial termination has occurred. Section 411(d)(3) merely requires that upon termination or partial termination, benefits become fully vested. It does not define "partial termination." The legislative history of § 411(d)(3) provides some examples of what might constitute a partial termination but does not set out clear standards for determining if a partial termination has occurred. The House and Senate Reports state that "[e]xamples of a partial termination might include, under certain circumstances, a large reduction in the work force, or a sizable reduction in benefits under the plan." H.R.Rep. No. 807, 93rd Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 4670, 4731; S.Rep. No. 383, 93rd Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 4890, 4935. The Treasury Regulation provides that

> Whether or not a partial termination of a qualified plan occurs (and the time of such event) shall be determined by the Commissioner with regard to all the facts and circumstances in a particular case. Such facts and circumstances include: the exclusion, by reason of a plan amendment or severance by the employer, of a group of employees who have previously been covered by the plan; and plan amendments which adversely affect the rights of employees to vest in benefits under the plan.

Treas. Reg. § 1.411(d)-2(b)(1).

In general, courts examine whether there has been a significant reduction in plan participants to determine if a partial termination has occurred. In evaluating whether there has been a significant reduction in plan participants, courts often have applied a "significant percentage" test. See *Kreis v. Charles O. Townley, M.D. & Assoc.*, 833 F.2d 74, 79 (6th Cir.1987). As the name suggests, when applying the significant percentage test courts examine the percentage of plan participants affected. Although there is no bright-line rule for what percentage is "significant," courts have found that termination rates of 34 and 51 percent constituted partial terminations while rates of 16.7, 13.0 and 12.4 percent were insufficient to establish partial terminations. See *id. at 83* (listing cases and percentages).

Here, the parties dispute how the percentage of affected plan participants should be calculated. The Plan argues that Matz cannot aggregate the participants affected by the various corporate transactions between August 1994 and May 1996. The Plan contends that Matz can count only those participants terminated from the Plan in a single plan year. Matz argues that it is proper to aggregate all participants terminated between August 1994 and May 1996 because the various corporate transactions were part of a single reorganization plan. The aggregation issue is important because it could dramatically influence the calculation of the number and percentage of affected plan participants. If Matz is able to aggregate terminations for 1994, 1995 and 1996, then there will be a higher number and percentage of affected plan participants and Matz will have a better chance of establishing that there was a partial termination of the Plan.

Neither 26 U.S.C. § 411(d)(3), the legislative history of § 411(d)(3), nor the relevant Treasury Regulation specifies whether Matz can aggregate participants terminated in multiple plan years to establish that a partial termination occurred. The Treasury Regulation provides that "all the facts and circumstances in a particular case" should be examined but does not clearly state that it is appropriate to examine the facts and circumstances in more than one year to determine if a partial termination has occurred.

The Plan and Matz each argue that the IRS has adopted their respective positions. The Plan notes that "[a]ll of the published Revenue Rulings dealing with the issue of partial terminations deal with one-year reductions in plan participation." The Plan's Mem. at 5. However, in each of the Revenue Rulings cited by the Plan, there was no dispute that the underlying event that affected the plan participants occurred in one year. The IRS never found that it was impermissible to aggregate terminations in multiple years to determine if a partial termination had occurred. Rather, it appears that the IRS has not explicitly taken a position. The Plan argues that the absence of any Revenue Ruling in which the IRS aggregated terminations over multiple years is persuasive evidence that the IRS looks only to terminations in a single year to determine if a partial termination has occurred. However, this court declines to interpret this silence as a definitive statement of the IRS' position.

The Plan and Matz both cite to the Internal Revenue Manual to support their respective positions. A subsection of the Manual addressing partial terminations contains the following language:

> There is no fixed turnover rate which determines whether a partial termination occurred, but the rate must be substantial. The facts and circumstances must be considered in each case and may include the extent to which terminated employees are replaced, and the normal turnover rate in a base period. The base period ordinarily should be a set of consecutive plan years (at least two) from which the normal turnover rate can be determined, and should reflect a period of normal business operations rather than one of unusual growth or

> reduction. Generally, the plan years selected should be those immediately preceding the period in question.

Internal Revenue Manual, Subs. 7753, Plan Termination Handbook, Sec. 252(6). The Plan argues that the Handbook's apparent focus on annual turnover rate indicates that the IRS is concerned with terminations in a single year. However, Matz notes that in discussing the time frame when the terminations occurred, the Handbook refers to the "period in question" and not to the "plan year in question." Thus, Matz argues that the choice of the open-ended "period in question" language indicates that the IRS is willing to consider terminations in multiple plan years.

The Plan argues that IRS Form 5300 indicates that it is not the practice of the IRS to aggregate terminations in multiple plan years to determine if a partial termination has occurred. An employer submits Form 5300 to the IRS to request a determination letter for the tax qualification of a plan. The Plan notes that Form 5300 directs employers to provide partial termination data for individual plan years. However, the directions for completing Form 5300 instruct the employer as follows:

> Partial Termination
>
> * * *
>
> 3. Using the format in the Partial Termination Worksheet above, submit a schedule of information for the plan year in which the partial (or potential partial) termination began. Also, submit a schedule for the next plan year, as well as for the 2 prior plan years, to the extent information is available.

IRS Form 5300 (attached to the Plan's Reply Mem. at Tab A). Form 5300's reference to "the plan year in which the partial (or potential partial) termination began" suggests that the IRS recognizes that the event causing a partial termination may carry over beyond one plan year. In addition, the request for information about the next plan year and the 2 prior plan years also indicates that the IRS is concerned with more than just a single plan year. Of course, as the Plan argues, it is also possible that the IRS may want the information about other plan years in order to establish the normal turnover rate for individual plan years. See Plan Handbook § 252(6) (quoted *supra*).

Matz and the Plan both strain to demonstrate that the IRS has taken a position on aggregating terminations in multiple plan years to determine if a partial termination has occurred. Based on the Revenue Rulings cited by the Plan, it appears that the IRS ordinarily looks at the terminations in a single plan year. However, it is not clear that the IRS would refuse to aggregate terminations over multiple plan years if the terminations were related. In the absence of more definitive evidence that the IRS has taken a position, this court refuses to presume that the IRS has adopted a position based on its failure to aggregate terminations in a published revenue ruling or on its choice of words on a form or in a handbook. Thus, this court finds that there is no clear IRS position entitled to deference.

Only two courts have explicitly addressed whether it is permissible to aggregate terminations from multiple years to establish that a partial termination has occurred. The two courts that have faced the issue have found that it is permissible to aggregate terminations for multiple years.

In *Weil v. Retirement Plan Admin. Comm.*, 750 F.2d 10 (2d Cir.1984) ("*Weil I*"), the Second Circuit reversed the district court's holding that no partial termination had occurred and remanded the case for further fact-finding. In *Weil*, the employer, Ward Foods, laid off a number of employees during the period between 1975 and 1980. In 1981, Ward was acquired and reorganized by the Terson Company. In response to a request for determination by Ward, the IRS ruled that there had not been a partial termination in any year between 1975 and 1980. The IRS did not aggregate terminations over the entire period as part of its partial termination analysis. The plaintiff in *Weil* argued that Terson partially terminated the plan in 1981. In remanding the case, the Second Circuit stated that

> the record is unclear whether employee terminations in 1980 may have been related to the then impending Terson acquisition and reorganization of Ward. If related, such terminations should be considered in determining whether Terson in 1981 partially terminated the Ward's Plan.

Weil, 750 F.2d at 13.[2] On remand, the district court found that the terminations in 1980 were not related to the terminations in 1981 and so did not count the 1980 terminations in determining if a partial termination had occurred. *Weil v. Retirement Plan Admin. Comm.*, No. 82 CIV. 8468, 1988 WL 64862, at *2 (S.D.N.Y. June 15, 1988).

In *In re Gulf Pension Litigation*, 764 F.Supp. 1149 (S.D.Tex.1991), the court addressed whether a partial termination resulted when Gulf Oil merged with Chevron. On January 1, 1982, Gulf Oil had 29,706 employees covered by its pension plan. *Id.* at 1160. In an effort to "streamline the company," Gulf reduced its workforce and by the end of 1983, Gulf employed only 23,054 employees who were covered by the pension plan. *Id.* In early 1984, Gulf merged with Chevron. *Id.* Over the next two and one-half years, Gulf sold off some its assets and laid off numerous employees, resulting in the termination of a significant percentage of participants from the pension plan. *Id.* The plaintiffs initially claimed that a partial termination occurred between 1981 and 1986. *Id.* However, after negotiations with the defendant, the plaintiffs dropped their claim that a partial termination occurred during the "streamlining" in 1982 and 1983.[3] *Id.* at 1161. However, the court did address whether the plaintiffs could aggregate the terminations occurring in the two and one-half years after the merger:

---

[2] The Plan argues that at least one circuit court has rejected the *Weil* court's ruling that it is appropriate to aggregate terminations in multiple years if the terminations are related. However, in the case cited by the Plan, *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134 (3d Cir.1987), the Third Circuit disagreed with the *Weil* court's apparent willingness to find a partial termination if a significant *number* of participants were affected (rather than examining whether a significant *percentage* of participants were affected). The Third Circuit did not criticize the *Weil* court's instruction to the district court to determine if the terminations in 1980 were related to the terminations in 1981.

> Defendants argue that in determining whether a vertical partial termination occurred the Court should consider only the number of employees excluded within a single plan year. The Court does not find this position to be supported by logic or required by authority. Most reported vertical partial termination rulings and decisions did not involve massive corporate restructuring of the scale implemented by Gulf and Chevron. The facts in those decisions were therefore generally limited to a period of less than a year. There is nothing in the language of the rule itself, however, that requires that a significant corporate event occur within a year, and the ending of a calendar or plan year has no intrinsic relevance in making this evaluation. The IRS guidance found in § 252(7) of the Plan Termination Handbook instructs that "[t]he turnover rate is determined by

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[3] The Plan argues that it is significant that the district court did not include the employees terminated in 1982 and 1983 in its partial termination analysis. However, as noted above, the plaintiffs elected not to pursue their partial termination claim for that period. In addition, it seems questionable whether the streamlining in 1982 and 1983 was related to the terminations resulting from the merger with Chevron. Here, of course, Matz is arguing that the various corporate transactions were related.

> dividing the employer-initiated terminations by the sum of the total participants at the start of the period and the participants added during the period." (emphasis added) Both the IRS, in its Technical Advice Memorandum Concerning The Employee's Retirement Plan of A & P Company, and the Second Circuit in *Weil I*, 750 F.2d at 12, have stated that a series of employer- initiated terminations related to the same event may be considered in determining whether a partial termination has occurred even if those terminations occur over a multi-year period. This Court likewise concludes that, assuming plaintiffs can prove it, a vertical partial termination may occur from a significant corporate event that manifests itself in employer- initiated terminations occurring over the two-and one-half-year period urged by plaintiffs.

Gulf Pension, 764 F.Supp. at 1167-68.

The Plan argues that the district court's decision to aggregate terminations is of no value because, in *Borst v. Chevron Corp.*, 36 F.3d 1308 (5th Cir.1994), "the Fifth Circuit vacated the district court's ruling on that issue." The Plan's Mem. at 10. This is a dubious reading of the Fifth Circuit's opinion. The issue on appeal was whether the participants of one plan were entitled to that plan's surplus assets. The Fifth Circuit did not vacate the district court's finding that a partial termination occurred. Instead, the Fifth Circuit stated that "[b]ecause we do not consider whether or not a partial vertical (or horizontal) termination occurred, the district court's ruling on this issue is not conclusive between the parties." *Borst*, 36 F.3d at 1314 n. 11. Indeed, the Fifth Circuit appeared to endorse the district court's decision to aggregate plan years, noting that "[t]he determination of whether a vertical partial termination has occurred generally is based on a consideration of the entire period in question: here, from March 1984 through June 1986. Affected employees are those who ceased participation in the Gulf Plan, by termination of employment, during that period, other than those employees whose termination was not the result of the merger and those employees who were transferred to another company." *Id.* at 1314 n. 9.

The parties cite to several other cases, but in those cases the courts do not address directly whether it is permissible to aggregate terminations over a period of more than one year. In *Halliburton v. Commissioner*, 100 T.C. 216 (1993), the Tax Court found that a partial termination of the plan had not occurred in 1986. Some of the employees terminated in 1986 were rehired between 1987 and 1989. The court found "the terminated participants who were rehired should not be considered in deciding whether a partial termination occurred." *Id.* at 247. The court declined to focus only on the events of 1986, stating that "we do not agree that we should limit ourselves to considering the events of only one plan year in resolving the partial termination issue, as events bearing on such issue may extend over more than one year." *Id. at 246.* While this indicates that the Tax Court took a broad view of the Treasury Regulation's mandate to consider all of the "facts and circumstances," the precise issue in *Halliburton* was whether terminated employees who were later rehired were affected employees who should be counted in the partial termination analysis. The court did not look at terminations occurring in years other than 1986.

In a number of cases cited by the Plan, the courts focused on only a single plan year to determine if a partial termination had occurred. However, in all of these cases, the courts did not discuss whether the law would permit aggregation of terminations in multiple plan years to determine if a partial termination had occurred. For example, in *Tipton & Kalmbach, Inc. v. Commissioner*, 83 T.C. 154 (1984), the Tax Court performed a separate partial termination analysis for 1971 and 1972 and found that a partial termination occurred in each year. The court did not address whether it would have been appropriate to aggregate terminations in 1971 and 1972 to determine if a partial termination had occurred. In other cases cited by the Plan it was clear that the terminations occurred in a single year and the courts did not address the aggregation issue. See *Sage v. Automation, Inc. Pension Plan*, 845 F.2d 885, 890-92 (10th Cir.1988); *Kreis*, 833 F.2d at 80; *Taylor v. Food Giant, Inc. Salaried Employees Pension Plan*, 6 E.B.C. 1291, 1293-94 (N.D.Ga.1984). Finally, in *Administrative Comm. Of the Sea Ray Employees' Stock Ownership and Profit Sharing Plan v. Robinson*, 164 F.3d 981 (6th Cir.1999), the court affirmed the district court's conclusion that there was not a partial termination of the plan resulting from layoffs between 1989 and 1991. The district court did not aggregate all terminations between 1989 and 1991 but instead examined the terminations in 1989-1990 and 1990-1991 separately. However, as Matz points out, the district court analyzed the terminations separately after concluding that "the layoffs at Sea Ray between 1989 and 1991 were caused by two separate events: a two-year downturn in the small boat industry and a downturn in the large boat business caused by the federal luxury tax." *Id.* at 988. The Sixth Circuit rejected the appellants' contention that all the terminations should be considered together, noting that "[w]e agree that the economic downturn in 1989 and the federal luxury tax in 1990, while both leading to dire consequences at Sea Ray, stem from two independent factors." *Id.* Thus, the Sixth Circuit did not find as a matter of law that it is always inappropriate to consider terminations in more than one year in calculating the number of affected plan participants. Instead, the Sixth Circuit merely concurred with the district court's finding that aggregating the terminations was not permissible in that particular case because the terminations were not related. Indeed, the Sixth Circuit appeared to presume that aggregation would have been appropriate if the terminations occurring in different years were related. *See also*, *Babb v. Olney Paint Co.*, 764 F.2d

240, 243 (4th Cir.1985) (noting that district court found that employer's decision to discontinue plan was unrelated to spin-off of division in previous plan year).

The Plan argues that aggregating terminations over multiple plan years does not further the policy rationale for the partial termination remedy. As noted in the November 30, 1998 opinion, courts have identified two possible purposes for the partial termination remedy: (1) protecting the pension benefits of nonvested participants; and (2) preventing employers from abusing pension plans to reap tax benefits. *See Weil v. Retirement Plan Admin. Comm.*, 933 F.2d 106, 109 (2d Cir.1991) (*"Weil III"*). The Plan argues that there is a diminished potential for an employer to benefit from an improper reversion of plan assets when terminations occur in more than one plan year. The Plan notes that each plan year results in an increase in vesting by partially vested plan participants. Thus, in the instant situation, each new plan year results in an additional 20 percent vesting for partially vested participants who are not terminated. While the Plan is correct that, because of this additional vesting, employers will receive a smaller reversion of plan assets when a partial termination occurs over more than one year, an employer still benefits. Similarly, the other possible purpose for the partial termination remedy—protection of pension benefits for nonvested participants—is still implicated when a partial termination occurs over more than one year. While the affected participants who are terminated in later years of the period in question will have greater vested benefits, unless they become fully vested they will still suffer the loss of some nonvested benefits.

The Plan also argues that if aggregation of plan years is permitted, employers will have no guidance as to when a partial termination might occur. The Plan contends that plaintiffs will be able to manufacture partial terminations by "cobbling" together events over several plan years. The

Plan's fears are exaggerated. In order to aggregate terminations in multiple plan years, plaintiffs must establish that the terminations in the different plan years are related. If the plaintiffs are unable to do so, then the terminations from different plan years will not be aggregated. *See Sea Ray*, 164 F.3d at 988.

After considering the various arguments of the parties, this court agrees with the other two courts that have addressed the issue and finds that it is appropriate to aggregate plan years to determine if a partial termination has occurred. As noted above, the IRS has not taken a clear position on whether it is appropriate to aggregate terminations in multiple plan years to determine if a partial termination has occurred. The Treasury Regulation instructs that "all facts and circumstances" be considered, and it is consistent with this direction to consider all terminations arising from a single corporate event, even if the terminations occur in more than one plan year. The House and Senate Reports state that "a large reduction in the work force" might be an example of a partial termination. There is no indication that this large reduction must occur within a single plan year. Although, as discussed above, the policy reasons for the partial termination remedy are diminished when terminations occur over a period of more than one plan year, they are still present to some degree. This court agrees with the court in *Gulf Oil* that a requirement that all terminations from a corporate event occur in a single plan year is not "supported by logic or required by authority."

In its reply brief, the Plan argues that Matz has not established that the events between August 1994 and 1996 were related parts of a reorganization plan. This is a factual dispute that is not ripe for decision. The only issue decided here is a legal one: if Matz is able to prove that the various corporate transactions were sufficiently related, then he may aggregate the terminations from the different plan years to try to establish that a partial termination occurred. The Plan's second motion for summary adjudication of issues is denied.

The Plan's Motion for Certification for Interlocutory Appeal

Following this court's November 30, 1998 opinion and order, the Plan filed a motion requesting that the order be certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The motion was entered and continued until the issue presented here was resolved. In light of the ruling denying the Plan's second motion for summary adjudication of issues, this court will deny without prejudice the motion to certify the November 30, 1998 motion for interlocutory appeal to permit the Plan to include the present order in its motion if the Plan so desires. If the Plan files a new motion (or resubmits the earlier motion) Matz will be given an opportunity to respond.

CONCLUSION

The Plan's Second Motion for Summary Adjudication of Issues [89] is denied. Matz' motion to strike Sections II and III of the Plan's memorandum [91] is denied. The Plan's Motion to certify the November 30, 1998 order for interlocutory appeal [85] is denied without prejudice.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

November 6, 2000

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*

No. 00-1109

ROBERT J. MATZ, ETC.,
Plaintiff-Appellee,

v.

HOUSEHOLD INTERNATIONAL TAX REDUCTION
INVESTMENT PLAN,
Defendant,Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division

No. 96 C 1095

JOAN B. GOTTSCHALL, *Judge*.

ORDER

On consideration of the petition for rehearing and petition for rehearing en banc filed in the above-captioned cause by the defendant-appellant, and the response thereto, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny rehearing. Accordingly, the petition for rehearing is DENIED.

Supreme Court, U.S.
FILED
MAR 12 2001
OFFICE OF THE CLERK

②

No. 00-1279

IN THE

Supreme Court of the United States

HOUSEHOLD INTERNATIONAL TAX
REDUCTION INVESTMENT PLAN,

Petitioner,

v.

ROBERT J. MATZ, Individually
and on Behalf of All Others Similarly Situated,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Does the Seventh Circuit's opinion denying Petitioner's interlocutory appeal conflict with any other federal appellate court decision on the issue of whether fully-vested pension plan participants, who are involuntarily terminated from participation in a qualified plan due to employer action, should be counted to determine whether a partial termination of the qualified plan has occurred?

2. Does the Seventh Circuit's consideration of the Internal Revenue Service's interpretation of the partial termination statute and corresponding Treasury regulation conflict with any decision of this Court?

3. Does the Seventh Circuit's opinion decide an important question of federal law that has not been decided by this Court but should be settled by this Court?

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RESTATEMENT OF THE CASE

A. Introduction

Petitioner's statement of the case begins with (and the Petition is premised on) the misstatement that: (a) there is a split among federal appellate courts on one of the two issues presented for review by this interlocutory appeal (Petitioner concedes there is no such split on the other issue); and (b) this appeal otherwise presents "significant and recurring" issues in need of resolution by this Court. Petition at 6. First, there is simply no such split among the federal appellate courts on any issue. Second, the questions presented for review here are not "significant and recurring" because the few federal appellate cases that have even addressed the issues have been consistently decided. Finally, this Court's review is not warranted because the interlocutory nature of this appeal dictates that any ruling on the issues by this Court will not even bring finality to this case.

B. Background Facts

Respondent, Robert J. Matz and other employees of Hamilton Investments, Inc. ("Hamilton"), a subsidiary of Household International, Inc., ("Household"), lost their jobs and the non-vested portions of their pension plan in 1994 when the assets of Hamilton were sold. Household sponsors Petitioner, a defined contribution employee pension plan, for both Household's employees and the employees of its subsidiaries, such as Hamilton. Subsequent to that transaction in 1994, Household proceeded with the sale of several other businesses and the termination of related employees and participants in Petitioner.

Petitioner is intended to be a qualified profit sharing plan under Internal Revenue Code § 401(a). Household makes matching contributions to Petitioner on behalf of those employees who have chosen to participate therein with their own contributions. All contributions by participants to Petitioner are completely vested, regardless of the length of time such participants have been employed with Household. However, until 1995, the matching contributions by Household to Petitioner on behalf of each participant were vested over a five-year period. During that five-year period, a participant would vest in the matching contributions at the rate of 20% per year. Accordingly, a participant in Petitioner would be fully vested after five years of participation. If five years of participation was not achieved by a participant, the unvested portion of Household's matching contributions were forfeited to Petitioner (and would reduce Household's future contributions to Petitioner).

In September 1995, Petitioner was amended to eliminate the five-year vesting schedule. As a result, all remaining participants in Petitioner were fully vested in their respective accounts, including Household's matching contributions to their accounts.

Respondent participated in Petitioner until the time of his termination on September 1, 1994, when Household sold Hamilton's assets. At the time of his termination, Respondent was 60% vested in the matching contributions made by Household and credited to his account. Respondent was given $27,914.10, the full amount of his vested account. The remaining unvested portion of Household's matching contributions, $7,289.92, was forfeited back to Petitioner.

C. Respondent's Lawsuit

Respondent filed the underlying class action in the United States District Court for the Northern District of Illinois in February 1996, on behalf of himself and all of those persons similarly situated. Respondent alleged that Household sold Hamilton "as part of an overall plan to refocus its business." (Complaint ¶ 12). That business plan also included the sale of Household's residential mortgage business, its mortgage servicing business, its banking business and a life insurance subsidiary. Respondent alleged that, as a result, a partial termination of Petitioner had occurred and, therefore, Respondent was entitled to the full amount of his pension account. This allegation by Respondent was based upon the provision within Petitioner that "in the case of the termination of [Petitioner] by Household International, Inc. . . . or a partial termination of [Petitioner] with respect to a group of participants, the account balance of each affected participant shall become 100% vested." Petition App. A. at 13a.[1]

D. The District Court's Rulings In Favor Of Respondent

In December 1997, Petitioner moved for partial summary judgment to exclude solely those participants in Petitioner who were terminated after September 1995, when Petitioner was amended, from both any partial termination analysis and from the plaintiff class itself. The district court denied Petitioner's motion as it concerned the partial termination analysis, but granted the motion to exclude those participants terminated after September 1995 from the plaintiff class.[2]

---

[1] Petitioner contains such a provision in order to comply with 26 U.S.C. § 411(d)(3), which requires a qualified employee benefit plan to fully vest the benefits of its participants in the event it is either fully, or partially, terminated.

Petitioner moved again for partial summary judgment on December 31, 1998, on the issue of whether events occurring in multiple plan years can be considered in determining if a partial termination has occurred. That motion was denied on September 8, 1999.

E. Petitioner's Interlocutory Appeal To The Seventh Circuit

Thereafter, on November 30, 1999, the district court granted Petitioner's motion to certify the November 30, 1998 and September 8, 1999 orders for interlocutory appeal. The specific questions certified for review by the Seventh Circuit were as follows:

> 1. Whether, for purposes of determining if the Plan was "partially terminated," the court's analysis should include fully-vested employees terminated after the 1995 Plan amendment; and
>
> 2. Whether the plaintiff's partial termination analysis may include terminations that take place over multiple (here, three) plan years.

Petition App. A at 4a-5a. The Seventh Circuit granted Petitioner's request for a permissive, interlocutory appeal of these issues on January 3, 2000.

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[2] Courts have generally held that termination of a number of employees does not constitute a "partial termination" unless there is a significant reduction in plan participants. In determining whether there is a significant reduction in plan participants, court often have applied a "significant percentage" test. *See Kries v. Charles O. Townley, M.D. & Associates, P.C.*, 833 F.2d 74, 79 (6th Cir. 1987). For the significant percentage test, courts look to see if a significant percentage of plan participants have been terminated. *See Kries*, 833 F.2d at 79-80.

F. The Seventh Circuit's Decision In Favor Of Respondent

The Seventh Circuit issued its opinion on September 21, 2000, affirming both orders of the district court. Petition App. A at 1a-11a. As set forth within its opinion, the Seventh Circuit reviewed the partial termination statute and its legislative history as well as the corresponding Treasury regulation. The Seventh Circuit concluded that each was ambiguous as to the standard for determining when a partial termination has occurred. Petition App. A at 5a-6a. However, the Seventh Court did conclude, after reviewing several decisions on the issue, that a "[p]artial termination is measured by using the ratio of terminated plan participants over the total plan participants." Petition App. A at 5a-7a. The Seventh Circuit also found the Internal Revenue Service's ("IRS") interpretation of the partial termination statute and Treasury regulation, as described in *Weil v. Retirement Plan Administrative Committee of the Terson Co., Inc.*, 933 F.2d 106 (2d Cir. 1991) ("*Weil III*"), to be "reasonable." Petition App. A at 8a-9a. In reaching that conclusion, the Seventh Circuit noted that "[n]either the statute, its legislative history nor the Treasury Regulation . . . differentiate between vested and non-vested participants." Petition App. A at 9a. The Seventh Circuit further determined that

> [a] finding of reasonableness is also supported by the fact that the exclusion of vested participants from the ratio calculation gives an inaccurate assessment of whether there has been a significant reduction in plan participation, the benchmark against which partial termination is measured. For the calculation to be accurate, the circumstances

> as a whole must be considered. This, we think, buttresses a finding that vested participants must be included.

Petition App. A. at 9a.

The Seventh Circuit also ruled that the district court was correct in deciding that terminations occurring over multiple plan years could be aggregated in determining whether a partial termination has occurred. Petition App. A at 10a. The Seventh Circuit observed that two other courts reached this issue, and both held that such aggregation was permissible, provided it can be shown "that the corporate events of those years were related." Petition App. A. at 10a-11a.[3] It also determined that while the partial termination statute and legislative history were silent on that issue, the partial termination regulation did provide that " 'all the facts and circumstances in a particular case' " must be considered. Petition App. A at 11a. The Circuit Court opined that

> to establish a rigid rule that only terminations in individual plan years can be counted allows an unscrupulous employer to terminate some participants in December of one year and January of the next, thereby eviscerating both the purpose of protecting employees' benefits and the purpose of prohibiting employers from reaping unfair tax benefits. We are convinced that the requirement

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[3] The issue of whether certain corporate events were, in fact, "related" to one another has yet to be decided and is not before this Court. Neither the district court nor the Seventh Circuit has reached that issue. Petition App. A at 11a, 36a-37a. Indeed, the district court made clear that such a factual determination "is not ripe for decision." Petition App. A at 36a.

> that the multiple year terminations be proven related prevents a plaintiff from gaining undue advantage too.

Petition App. A at 11a.

On November 6, 2000, the Seventh Circuit denied Petitioner's petition for rehearing.

REASONS FOR DENYING THE WRIT

I. THE SEVENTH CIRCUIT'S RULING DOES NOT CONFLICT WITH ANY OTHER RULING ISSUED BY A FEDERAL APPELLATE COURT

As a threshold matter, there is no compelling reason for this Court to grant the Petition. Quite simply, the Seventh Circuit's denial of Petitioner's interlocutory appeal does not conflict with the opinion of any other federal appellate court which considered the issues presented here for review.[4]

As to the first issue decided by the Seventh Circuit (*i.e.*, whether to count fully-vested plan participants who are involuntarily terminated in determining whether a partial termination has occurred), Petitioner combines patent illogic and wishful thinking in contending that the decision of the Seventh Circuit (and the Second Circuit's decision in

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[4] Even Petitioner concedes, as it must, that there is no split among the federal appellate courts with respect to the second issue decided by the Seventh Circuit (*i.e.*, whether the partial termination analysis may include terminations that take place over multiple plan years). Accordingly, it is undisputed that review of that issue is unnecessary.

Weill III) is "directly" at odds with the decision in *Babb v. Olney Paint Co.*, 764 F.2d 240 (4th Cir. 1985).[5]

Significantly, although Petitioner premises its entire "conflict" argument on the Fourth Circuit's decision in *Babb*, Petitioner barely discusses the facts or holding of the case and fails to make even a cursory attempt to demonstrate how the decisions of the Seventh and Fourth Circuits are in conflict with one another. Instead, Petitioner asks this Court to rely *solely* upon Petitioner's bald assertion that such a conflict exists, apparently in hopes of creating an issue worthy of writ consideration. However, even the most superficial reading of *Babb* shows that no such conflict can conceivably be said to exist.

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[5] Petitioner also contends that the Seventh Circuit's ruling directly conflicts with a nine-year-old decision rendered by the United States District Court for the Southern District of Texas in *In re Gulf Pension Litigation*, 764 F. Supp. 1149 (S.D. Tex. 1991), *aff'd on other grounds sub nom. Borst v. Chevron Corp.*, 36 F.3d 1308 (5th Cir. 1994), *cert. denied*, 514 U.S. 1066, 115 U.S. 1699 (1995). Although Respondent does not dispute that the Seventh Circuit's ruling conflicts with the previous ruling issued by the district court in *In re Gulf Pension Litigation*, Respondent submits that such a conflict is not an appropriate or relevant consideration for granting *certiorari* and should not be considered by the Court. *See* Sup. Ct. R. 10. Moreover, and as will be demonstrated more fully herein, Petitioner's position cannot be reconciled with the decision in *In re Gulf Pension Litigation*. Indeed, Petitioner has, at all times, contended that vested participants should be excluded from *only the numerator* of the equation used to determine if the plan has been reduced by a significant percentage. Petition App. A at 7a. However, the decision of the district court in *In re Gulf Pension Litigation* held that vested plan participants should be excluded from *both the numerator and the denominator* in determining whether a "significant percentage" of plan participants have been terminated. 764 F. Supp. at 1165 n.10. Quite clearly, the contention advanced by Petitioner cannot be reconciled with the holding in *In re Gulf Pension Litigation*.

Petitioner claims that the Fourth Circuit considered only non-vested participants for the purpose of the partial termination analysis. Petition at 13. However, the Fourth Circuit did *not* even address, let alone decide, the issue of whether fully-vested plan participants are to be included in a partial termination analysis. Contrary to Petitioner's assertion that "the court considered only participants who were not fully vested" (Petition at 13), that issue was, quite simply, not before the Fourth Circuit. The mere fact that the Fourth Circuit affirmed a district court's finding of no partial termination as a result of a reduction in plan participation of non-vested employees, does not transform the opinion in *Babb* into a decision that "directly" conflicts with the Seventh Circuit's ruling that fully-vested plan participants are counted to determine whether a partial termination has occurred.

In *Babb*, the employer, Olney Paint Company, spun off one of its divisions on November 30, 1981, and transferred the assets of that division to a newly-formed entity. As of November 1981, all of the employees in the division that was spun off participated in Olney Paint's profit sharing plan and pension plan. *Babb*, 764 F.2d at 242. Those employees were faced with termination if they did not resign from Olney Paint and accept employment with the new entity. Sixteen employees accepted employment with the newly-formed entity. The Fourth Circuit noted that two of the employees were fully-vested in the plans. The percentage of all participants excluded from future participation, including those fully-vested, was 14.7%; the percentage of non-fully-vested participants excluded from future participation was

Petitioner reasons that, although the Seventh Circuit never once mentioned this Court's decision in *Chevron*, it "clearly gave *Chevron* deference to the [IRS] amicus curiae brief submitted to the Second Circuit in *Weil III*." Petition at 17. While there is no evidence that the Seventh Circuit afforded the IRS' position such *Chevron* deference or did anything other than note the IRS' position was "reasonable" in light of the language of the partial termination statute and Treasury regulation, such deference, if it had been afforded, would have been proper.

Every court that has examined the partial termination statute and corresponding Treasury regulation to determine whether fully-vested plan participants are to be included in the partial termination analysis has found the language of both to be ambiguous and silent on the issue. Petition App. A at 7a; *Weil III*, 933 F.2d at 110. Accordingly, pursuant to *Auer*, judicial deference should be afforded the IRS' interpretation of the partial termination statute and Treasury regulation, which interpretation is entirely consistent with the legislative purpose and history of the statute.

Recognizing that *Auer* is fatal to its Petition, Petitioner ignores this Court's opinions and makes the truly remarkable assertion that *Auer* simply "cannot be reconciled with *Christensen*." Petition at 18 n.9. Petitioner makes this assertion even though this Court, in *Christensen*, *specifically reconciled its decision in Auer with its decision in Christensen*:

> In *Auer*, we held that an agency's interpretation of its own regulation is entitled to deference. [Citation.] But *Auer* deference is warranted only when the language of the regulation is ambiguous.

> The regulation in this case, however, is not ambiguous — it is plainly permissive. To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation. Because the regulation is not ambiguous on the issue of compelled compensatory time, *Auer* deference is unwarranted.

Christensen, 529 U.S. at 588, 120 S. Ct. at 1663.

Accordingly, despite Petitioner's contention to the contrary, Justice Thomas, writing for the majority of this Court in *Christensen*, easily reconciled the two cases in language applicable to this case. Quite simply, where a regulation is ambiguous (like here), deference is warranted under *Auer*. On the other hand, when the agency's position is clearly contrary to the unambiguous language of a regulation (like *Christensen)*, no such deference is warranted. By contending that the two cases cannot be reconciled, and making no attempt to distinguish *Auer*, Petitioner concedes the application of *Auer* to this case.

Moreover, just as in *Auer*, the IRS' interpretation of the partial termination statute and Treasury regulation was not made in response to a specific taxpayer request under a specific fact pattern, but was, instead, an explanation of the agency's official and long-standing position. *Weil III*, 933 F.2d at 109-11. *See also* Section 252(7) of the Internal Revenue Manual, 7753, Plan Termination Handbook (April 20, 1990) (stating that the IRS takes the position that fully-vested plan participants are counted for purposes of a partial termination analysis). The Petitioner's contention (Petition at 8) that the IRS has not been consistent in its position is

12.84%. *Id.*[6] Apparently, the district court relied on the 12.84% figure to find that a partial termination of the qualified plan had not occurred. *Id.* at 243. Without any discussion whatsoever of whether fully-vested employees are to be counted in a partial termination analysis or whether the district court properly excluded fully-vested participants from the analysis, the Fourth Circuit affirmed the district court's finding that no partial termination had occurred, holding only that such a finding was "not clearly erroneous." *Id.* at 244.[7]

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[6] It is generally accepted that a 20% or more reduction in a pension plan is "significant" for purposes of determining whether a partial termination has occurred. ***E.g.*, *Halliburton Co. v. Commissioner of Internal Revenue*,** 100 T.C. 216, 237 (1993), ***aff'd without opinion*, *Halliburton v. Commissioner*,** 25 F.3d 1043 (5th Cir. 1994), ***cert. denied sub nom. Nash v. Halliburton Co.*,** 513 U.S. 989, 115 S. Ct. 486 (1994).

[7] Petitioner further asserts that, in addition to the Fourth Circuit, "perhaps the Fifth [Circuit]" has decided the issue in conflict with the Seventh and Second Circuits. Petition at 16. That assertion is baseless, for not one of the Fifth Circuit decisions relied upon by Petitioner can be fairly read in such a manner. In ***Halliburton Co.*,** the United States Tax Court expressly stated that "it need not decide" whether fully-vested plan participants should be included in a partial termination analysis. 100 T.C. at 244. Thereafter, the Fifth Circuit affirmed the decision of the tax court ***without opinion*. *Halliburton Co.*,** 25 F.3d at 1043. Likewise, in ***Borst*,** the Fifth Circuit expressly stated that it did ***not*** consider the district court's ruling that a partial termination had occurred and, therefore, that ruling "is not conclusive between the parties." ***Borst*,** 36 F.3d at 1314 n.11. Even more damning to Petitioner's assertion is the decision in ***Morales v. Pan American Life Insurance Co.*,** 914 F.2d 83 (5th Cir. 1990). There, the Fifth Circuit ***affirmed*** the district court's finding that no partial termination had occurred. Among its many other rulings, the district

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In reality, and as stated by the Seventh Circuit, only two federal appellate courts — the Second and the Seventh — have directly addressed and ruled on the issue of whether fully-vested plan participants who are involuntarily terminated from participation in a qualified plan due to employer action should be counted to determine whether a partial termination of the qualified plan has occurred. Those two courts have agreed that such fully vested participants should be counted.

Specifically, in *Weil III*, the Second Circuit held that fully-vested plan participants who were involuntarily terminated from future participation should be counted to determine whether a partial termination of the qualified plan has occurred. *Id.* at 110-11. In the case below, the Seventh Circuit also held that fully-vested plan participants must be included in determining whether a partial termination of the

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court held that ***both vested and non-vested participants who were terminated from future plan participation must be considered for the purpose of a partial termination analysis***. Counting both vested and non-vested participants, the district court found that there was not a significant percentage of participants terminated from the plan and that, consequently, no partial termination had occurred. *Morales v. Pan American Life Insurance Co.*, 718 F. Supp. 1297, 1302-303 (E.D. La. 1989). On appeal, the Fifth Circuit upheld the district court's decision that no partial termination had occurred. *Morales*, 914 F.2d at 86. Although Respondent does not contend that the Fifth Circuit has ruled on the issue, under the "logic" used by Petitioner (*i.e.*, when a Circuit Court generally affirms a district court's partial termination findings, it also specifically affirms the district court's inclusion or exclusion of vested participants), the Fifth Circuit has clearly ruled in *harmony* with the Seventh Circuit on the issue of inclusion of vested participants. Accordingly, there is no conflicting Fifth Circuit decision. To imply otherwise is misleading.

plan has occurred. Petition App. A at 9a. Further, the IRS, the agency responsible for enforcing the partial termination statute and corresponding Treasury regulation, also takes the position that fully-vested plan participants who are involuntarily terminated from future plan participation by virtue of employer action are counted to determine whether a partial termination has occurred. *Weil III*, 933 F.2d at 110-11.

There are *no* conflicting decisions among the federal appellate courts (or the IRS) on the question of whether fully-vested plan participants are counted for the purpose of a partial termination analysis. Thus, pension plans with participants in different geographical areas are not, as Petitioner contends, "subject to different directives." Petition at 16. Because review by this Court of this interlocutory appeal on this issue is unnecessary, the Petition should be denied.

Similarly, and as the Petitioner has conceded by its silence, there are also no conflicts in the federal appellate courts concerning the second issue decided by the Seventh Circuit (*i.e.*, whether terminations occurring over multiple plan years may be aggregated for purposes of determining whether a partial termination has occurred). Accordingly, review by this Court on that issue is equally unnecessary.

II. THE SEVENTH CIRCUIT'S CONSIDERATION OF THE IRS' INTERPRETATION OF THE PARTIAL TERMINATION STATUTE AND CORRESPONDING TREASURY REGULATION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT

Petitioner next argues that because the Seventh Circuit considered the position of the IRS in interpreting the partial termination statute and corresponding Treasury regulation, its opinion somehow conflicts with a decision of this Court. The linchpin of that argument is Petitioner's contention that certain decisions made by this Court over the past three years regarding the level of deference to be given to an agency's interpretation of its regulations "cannot be reconciled" (Petition at 18 n.9), even though this Court has expressly said they can be reconciled. Because the Seventh Circuit's consideration of the IRS' position is appropriate under this Court's decisions, and because the decisions, as this Court found, can be easily reconciled with each other, this attempt by Petitioner to create a conflict must also fail.

In *Auer v. Robbins*, 519 U.S. 452, 457-63, 117 S. Ct. 905, 909-12 (1997), this Court held that an agency's interpretation of its own regulation — even if that interpretation is set forth in an *amicus curiae* brief — is entitled to the kind of deference described in *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984), when the language of the regulation is ambiguous or silent as to the question at issue. Consistent with those decisions, in *Christensen v. Harris County*, 529 U.S. 576, 120 S. Ct. 1655 (2000), this Court held that a court need not give *Chevron* deference to an agency's opinion letter when that opinion letter is at odds with an unambiguous regulation.

incorrect. The IRS has *never* published a formal ruling which states that fully-vested participants are not to be included in the partial termination analysis. Nor has the IRS ever taken a litigation position otherwise at odds with such a position. Indeed, Petitioner can only point to a 1981 private letter ruling issued by a local IRS district office, indicating that only non-vested participants are taken into account in a partial termination analysis, which ruling the IRS stated was issued in error and contrary to its long-held position. *Weil v. Retirement Plan Administrative Committee of the Terson Co., Inc.*, 913 F.2d 1045, 1050 (2d Cir. 1990) ("*Weil II*"), *vacated in part on other grounds on rehearing*, *Weil III*; *Weil III*, 933 at 109-111.[8]

Further, Petitioner makes much of the fact that the IRS's interpretation of the partial termination statute and Treasury regulation was not the product of formal " 'notice-and-comment' rulemaking." Petition at 16. According to Petitioner, "[a]n agency interpretation stated in an amicus brief clearly is not the kind of interpretation to which *Chevron* deference is due." Petition at 17. Such a contention is in direct conflict with this Court's decision in *Auer*, which involved an amicus brief.

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[8] Petitioner also argues that the IRS' position is not consistent because Form 5310, Application for Determination for Terminating Plan, asks for the number of total participants terminated and the number terminated without full vesting. This argument is meritless. As stated in the instructions for Form 5310, "*to request a determination as to the plan's qualification status for partial termination, file Form 5300 . . . [d]o NOT file Form 5310.*" (Emphasis in original). Internal Revenue Service Instructions for Form 5310 (revised June 1997), Application for Determination for Terminating Plan at 1. Thus, Form 5310 is completely irrelevant to the issue at hand.

Finally, unlike *Christensen*, the IRS' interpretation is not at odds with the language of the Treasury regulation itself, the partial termination statute or its legislative history. The legislative history of the partial termination statute states that "[e]xamples of a partial termination might include, under certain circumstances, a large reduction in the work force or a sizable reduction in benefits under the plan." H.R. Rep. No. 807, 93rd Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 4670, 4731; S. Rep. No. 383, 93rd Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 4890, 4935. The phrase "large reduction in the work force" is without reference to a participant's vesting status. The broad, all-inclusive language of the partial termination regulation (*e.g.*, examine "all the facts and circumstances," examine a "group of employees who have been previously covered by the plan," *etc.*) supports the IRS' interpretation. Finally, various IRS Revenue Rulings and General Counsel Memorandums have embraced the all-inclusive language of the partial termination statute and the IRS' interpretation of it. *Weil III*, 933 F.2d at 107 n.1, 109-111.[9] For all of the above reasons, the IRS' interpretation of the partial termination statute and corresponding Treasury regulation is entitled to judicial deference under the standards set forth in *Auer*.[10]

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[9] An IRS position articulated in a Revenue Ruling is entitled to considerable weight. *United States v. Wisconsin Power & Light Co.*, 38 F.3d 329, 334 (7th Cir. 1994). Further, General Counsel Memorandums issued by the IRS may be helpful in interpreting the tax code. *Id.* at 334.

[10] In addition to *Auer*, Petitioner's contention also completely ignores various other decisions of this Court. *E.g.*, *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512, 114 S. Ct. 2381, 2386

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It is clear, therefore, that consideration of the IRS' interpretation of the partial termination statute and corresponding Treasury regulation by the Seventh Circuit does not conflict with any decision of this Court.

III. PETITIONER HAS FAILED TO DEMONSTRATE ANY IMPORTANT QUESTION OF FEDERAL LAW THAT NEEDS TO BE SETTLED BY THIS COURT

Finally, Petitioner contends that even if the Seventh Circuit's opinion does not conflict with any federal appellate court decision or the decisions of this Court, the "lower courts are struggling mightily" with the issue of partial termination, and that "the lower courts need the prompt assistance of this Court. . . ." Petition at 19. However, as Respondent has already demonstrated, and as Petitioner's brief clearly shows, this simply is not so. Respondent respectfully submits that Petitioner has conceded as much by offering no evidence of this "struggle" and instead is simply rehashing the arguments both lower courts found unpersuasive. Despite its dramatic

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(1994); *Immigration and Naturalization Service v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 189-90, 112 S. Ct. 551, 555-56 (1991) (agency's reasonable, consistently-held interpretation of its own regulation is entitled to deference); *Stinson v. United States*, 508 U.S. 36, 44, 113 S. Ct. 1913, 1919 (1993) (as long as an agency's interpretation of its own regulation does not violate the Constitution or a federal statute, it must be given controlling weight unless it is plainly erroneous); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S. Ct. 1835, 1850 (1989) (same); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S. Ct. 1215, 1217 (1945) (administrative interpretation of its regulation is controlling unless it is plainly erroneous or inconsistent with the regulation).

plea for guidance by this Court, Petitioner, in a moment of candor, admits that its argument is really that "the decision of the court below is simply wrong." Petition at 23. The decision is only "wrong" because it goes against Petitioner. In any event, such a contention is not a basis for review on a writ of *certiorari*. *See* Sup. Ct. R. 10.

There were only two issues certified for review before the Seventh Circuit. The first concerned whether fully-vested employees should be included in a partial termination analysis. On that issue Petitioner cites this Court to only *three* decisions, *Weil III*, *Halliburton Co.* and *In re Gulf Pension Litigation*, none of which support its position.[11] The paucity of decisions relied upon by Petitioner belies its claims of federal courts "struggling mightily" with this issue in "recurring" cases. No such struggle exists and, therefore, it is not necessary for this Court to address this issue.

The second issue certified for review before the Seventh Circuit concerned whether a partial termination analysis may include terminations that take place over multiple plan years. Here, again, Petitioner is only able to muster the *same three* decisions. This is clearly no surprise. Indeed, the Seventh Circuit itself noted that "this issue has been addressed by *only two other courts (excluding the District Court below)*

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[11] To be fair, it should be noted that Petitioner has cited to a number of other decisions. Petition at 21-22 n.11. In fact, Petitioner has referenced several decisions, each for the proposition that "[f]ederal courts consistently have held that a partial termination occurs if there has been a permanent reduction of a 'significant percentage' of the plan participants because of a major corporate event." Petition at 21-22 n.11. That proposition, however, is undisputed between the parties. Moreover, that proposition was never at issue in the Seventh Circuit. Nor is it as issue now.

Respectfully submitted,

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Indeed, such classification rulings "merely interpret[] and appl[y] Customs laws to 'a specific set of facts.' " *Mead Corp.*, 185 F.3d at 1307, *quoting* 19 C.F.R. § 177.1(d)(1)(1998). Here, the IRS' interpretation of the partial termination statute and Treasury regulation was not issued so as to apply to only a specific set or facts. To the contrary, that interpretation was issued to assist the Circuit Court in *Weill III* by explaining the long-standing position of the IRS on the issue of partial terminations. As such, there is no similar question before this Court in *Mead Corp.* As such, there is, then, no reason for this Court to delay ruling on this Petition.

and both have found that it is permissible to aggregate terminations for multiple years." (Emphasis added). Petition App. A at 10a. Again, the absence of such cases belies Respondent's dramatic claim of a "mighty struggle" on this issue among the federal appellate courts and again suggests this Court's involvement is simply not necessary at this stage.

The lower courts are not "struggling mightily" with partial terminations, nor are they in need of prompt assistance from this Court. Indeed, as has been well demonstrated, the decisions in this area of federal law are not only few in number, but also consistently decided.

Moreover, even on the merits Petitioner is unable to demonstrate that the Seventh Circuit's decision was "wrong." In fact, Petitioner has cited to no decision which supports its position. For example, Petitioner has, at all times, argued that insofar as it concerned a partial termination analysis (*i.e.*, the ratio of terminated plan participants over total plan participants), fully-vested participants should *only* be considered in the *denominator* of the equation. Petition App. A at 7a. That position has absolutely no support. Indeed, Petitioner has not cited to a *single* case which supports such a position. Even Petitioner's favorite case, *In re Gulf Pension Litigation*, never went as far as Petitioner wishes to go now. There, the district court determined that, for purposes of partial termination analysis, fully-vested participants should be excluded from both the numerator *and* the denominator, not just one-half of the equation as Petitioner contends in this case. *In re Gulf Pension Litigation*, 764 F. Supp. at 1165 n.10.

Petitioner has also, at all times, maintained that a partial termination analysis should not permit the aggregation of terminations over multiple plan years. This position also has absolutely no support. Indeed, there is nothing in the partial termination statute or Treasury regulation that limits which plan years may be considered. Moreover, each and every court that has explicitly or implicitly addressed the issue has found that aggregation is permissible. *E.g.*, *Weil v. Retirement Plan Administrative Committee for the Terson Co., Inc.*, 750 F.2d 10, 13 n.2 (2d Cir. 1984) ("*Weil I*"); *In re Gulf Pension Litigation*, 764 F. Supp. at 1167-168.

In short, there are few cases addressing these issues and the Seventh Circuit's decision is consistent with the few federal appellate courts who have even addressed these issues. Therefore, there is no pressing need for this Court's involvement.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court deny the Petition for a Writ of Certiorari.[12]

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[12] In addition to all of the other arguments raised by Petitioner, it has also requested that this Court "hold" this Petition "pending the decision in *United States v. Mead Corp.*, No 99-1434. Petition at (i) n.1. According to Petitioner, a similar question is before this Court in that appeal. Respondent respectfully disagrees. The issue in *Mead Corp.* concerns what degree of deference, if any, should be afforded United States Customs Service classification rulings which implicitly interpret certain provisions of the Harmonized Tariff Schedules of the United States. Unlike the IRS' interpretation of the partial termination statute and Treasury regulation, the classification rulings at issue in *Mead Corp.* were *not* "intended to clarify the rights and obligations of importers beyond the specific case under review." *Mead Corp. v. United States*, 25 F.3d 1304, 1307 (Fed. Cir. 1999).
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